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Volume 2
TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1947

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vs.
THE CEMENT INSTITUTE, et al.

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vs.
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No. 25
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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 20, 1947
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Main Hearing Room,
Federal Trade Commission Building,
815 Connecticut Avenue,
Washington, D. C.

Wednesday, December 1, 1937.

Met, pursuant to adjournment, at 10 o'clock a. m.

Before:

John W. Norwood, Examiner.

Appearances:

Walter B. Wooden, Lynn C. Paulson, and Everett MacIntyre, on behalf of the Federal Trade Commission.

Donovan, Leisure, Newton & Lumbard, by George S. Leisure, Thomas J. McFadden, Henry Herrick Bond, James R. Withrow, Jr., and Ira C. Werle, on behalf of The Cement Institute and various respondent companies.

George W. Jacques, on behalf of Lehigh Portland Cement Company.

Kemper K. Knapp, on behalf of Universal Atlas Cement Company.

Louis H. Porter, on behalf of Alpha Portland Cement Company.

Donald F. McPherson, on behalf of Consolidated Cement Corporation, Trinity Portland Cement Company, Signal Mountain Portland Cement Company and Florida Portland Cement Company.

Horace G. Hitchcock, on behalf of International Cement Corporation (Lone Star Cement Corporation).

Richard F. Burgess, on behalf of Southwestern Portland Cement Company.

A. W. Witherspoon, on behalf of Spokane Portland Cement Company.

Robert West, on behalf of Pennsylvania Cement Company.

Herbert S. Little, on behalf of Superior Portland Cement, Inc.

Wright, Gordon, Zachary & Parlin, by Blackwell Smith, George Nebolsine and Joseph V. Heffernan, of behalf of Green Bag Cement Company of Penn.

Hal H. Smith, on behalf of Huron Portland Cement Company.

Edward W. Zimmerman and H. W. Noonan, on behalf of Marquette Cement Manufacturing Company.

39 EXCERPTS FROM OPENING STATEMENTS.

Mr. Wooden: In the main, however, the complaint charges the cement industry, these respondents, with maintaining a combination to suppress price competition through the use of the so-called basing point system; that the cornerstone of the system is the industry's united policy of selling only at delivered prices and refusing to sell otherwise.

40 These methods are so vital to the system that they may be said to be part of the system and they are merely typical.

* * * * * *

49 Mr. Little: Your Honor, on behalf of the Superior Portland Cement, Inc., I merely want to add this statement, that not only has the Superior Portland Cement, Inc., which is located 3,000 miles away in the State of Washington, never employed the so-called multiple

50 point basing system or been guilty of the conspiracies alleged in Count 1 nor resorted to the practices alleged in Count 2, but also its sales are exclusively intrastate, and therefore in making our appearance here, we are not waiving our right to move to dismiss on the ground that we are not subject to the jurisdiction of the Federal Trade Commission.

HUGH E. WHITE, called as a witness on behalf of the Commission, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am an examiner on the economic staff of the chief examiner of the Federal Trade Commission. I have
51 been connected with the Federal Trade Commission since 1922. Prior to that time, I was in contact with the Federal Trade Commission during the prosecution of the so-called Pittsburgh basing case, which involved similar practices in the Iron and Steel Industry.

The witness identified Com. Ex. 1 as a general outline map of the United States, on which have been portrayed, in a number of symbols, the locations of the various plants of the various cement producers. The map was prepared under his direct supervision. The basic data on the map is contained in the publication of the Bureau of Mines of the United States Department of the Interior entitled "Cement; statistical appendix to Minerals Year Book,
52 1932-33," which seems to have been prepared by B. W. Bagley. The witness checked the map, and he believes it to be correct with possibly one exception. A comment should be made in connection with this Lehigh Valley Northampton Group. There are two mills located within what is here described as the Lehigh Northampton District which are shown to be Steubenville, New Jersey, and Vulcanite, N. J. That may not be strictly accurate. They may not be within what is commonly known as the Lehigh Northampton Group. He is not certain. There is a key containing numbered symbols which show the ownership of the mills. The key is "our" own construction. The basic data is all contained in the publication to which he has referred, and which he perhaps ought to say has been modified slightly by some pen and ink addi-
53 tions and erasures, made, he is informed by the Bureau of Mines, by Miss B. W. Bagley. She appears as author of the pamphlet that he refers to. On the left hand side of the exhibit appear companies numbered 1 to 5 which are in that order: Universal Atlas Cement Company, the Lehigh Portland Cement Company, Lone Star Company or subsidiaries of the International, the Alpha

Portland Cement Company, and the Penn-Dixie Cement Corporation. They are colored respectively, red, green, yellow, blue and seemingly brown. The light is not good and he is not sure of the last. Those, he might say, are the five largest producers in point of production. There are a number of States shown on the map without having a cement mill located within their borders. He has not counted them. They are comparatively few. They
54 are for New England, New Hampshire, Vermont, Massachusetts, Connecticut and Rhode Island; in the southeast, it is North and South Carolina; in the south, Mississippi; in the southwest, there are none in New Mexico; in the west, Nevada; and in the north, North Dakota. All the other States have one or more cement mills located therein.

Mr. Wooden: I would like to offer the map for the record, Your Honor. There will be a little supplementary testimony by another witness regarding sources on which it is based, and I would suggest that it be mounted on an easel here where we can make frequent reference to it. I think that will be very helpful.

Mr. Leisure: May we look at that for just a second? I do not think there will be any objection to it.

Mr. Wooden: Certainly.

Mr. Leisure. May we have the map dated? There is no date on the map. As of what date?

The Witness: The basic data, as I said, is contained in this Mineral Year Book 1932-1933. The exact date has not been fixed.

Mr. Leisure: If Your Honor please, subject to check as to the correctness, we have no objection.

55 (The map referred to was thereupon marked "COMMISSION'S EXHIBIT 1," and was received in evidence.)

By Mr. Wooden:

Q. Mr. White, I am now showing you some papers marked Commission's Exhibit 2 for identification. I will ask you to state what they are and what your connection with them is.

A. An alphabetical list of certain cement producers who have interlocking or common directors. It was prepared from Poor's Manual.

Q. What is the date?

A. The current year, 1937.

Q. What did you have to do with the preparation of that compilation?

A. I merely gave directions that such a list be prepared and I have checked it to ascertain if it was correctly made.

Q. Do you vouch for the correctness of the compilation as made from the source indicated?

A. I do.

Mr. Wooden: I offer it for the record, Your Honor.

Mr. Leisure: If Your Honor pleases, since this
56 refers to interlocking directors, as I understand it, I object to it on the ground that it is incompetent, irrelevant and immaterial and as not tending to prove any of the issues outlined in either cause of action. For that reason I object to that exhibit.

Mr. Wooden: Of course, the complaint, Your Honor, makes no issue of the interlocking directors, but this exhibit is offered on the theory that any evidence tending to make more possible or probable coordination or collusion on the part of the respondents is competent and relevant, and on that theory, interlocking directors among them is a fact to be considered.

Examiner Norwood: I think it will save us considerable time to have this in, and possibly record space, to have the names of these officers associated with these various companies in.

Mr. Leisure: My objection, Your Honor, goes to the materiality. It is too remote. The fact that a man belongs to the same club or the same corporation is no evidence that he indulged in a conspiracy, and my objection goes to its competency. It is too remote and is incompetent, immaterial and irrelevant.

57 (COM. EX. 2-A to F was offered and received in evidence.)

Mr. Leisure: In the interests of time, may we have the usual equity proceeding practice that an objection also carries and exception?

Examiner Norwood: An exception is deemed to have been made at the proper time to every adverse ruling, if counsel for the Commission accepts that.

Mr. Wooden: Yes. Nothing further, if you want to examine Mr. White?

Mr. Leisure: No questions.

(Witness excused.)

BELLE WORTH BAGLEY, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am a statistician in the Bureau of Mines, Division of Non-metallic Minerals, which division includes the
58 handling of cement statistics. I have handled the matter of cement statistics monthly and annually since about 1921. In that year I think we began the monthly cement statistics. The nature and scope of my duties in connection with the handling of cement statistics has varied. At present I have the mailing of annual and monthly requests to all producers, then compilations from the editing of those schedules of a monthly and annual
59 report. There are two monthly reports, one showing the mill shipments, the other showing the distribution of such shipments. All that information is collected by a questionnaire sent to each plant. I started in that particular line of activity at the Bureau of Mines, as I said, in 1921 or possibly two or three years before that although I had experience in other lines of work. The length of time in which my name has appeared on the printed reports has varied. It has been since 1921 I think. It can be ascertained by the records of the Bureau. For the last five years I have been in partial charge of the pub-
60 lication of the Bureau's reports, on which my name has appeared.

Q. You heard Mr. White testify a few moments ago about the location of the cement plants?

A. Yes.

Q. As being taken from your report in 1932?

A. Yes.

Q. Together, I believe, with some changes made in ink, as I understood it, by you. Is that correct?

A. The changes are as far as the records of the Bureau of Mines as to address given by the producers from their own schedules and the location of their plants from their own schedules, but not as to trade names. I have not attempted to correct that.

Q. Just as to location and names?

A. Location and names. My records are from the plants themselves.

Q. And I notice this publication is 1932. Now, do the changes in ink bring that down to a later date than 1932?

A. The changes in ink as referring to town address and town location, as you can see, to November 15. I could say almost as to yesterday as known to the Bureau of Mines.

Q. As reported to the Bureau of Mines?

A. As known to the Bureau of Mines. We take nothing but from the reports of the producers.

61 Q. Do I understand then that not merely the location of the plant, but the figures that the Bureau of Mines publish as to production and shipments and similar statistical data are based upon reports received from the members of the industry?

A. From the producers themselves.

Q. I am showing you now a pamphlet marked Commission's Exhibit 3 for identification and purporting to be a publication of the Bureau of Mines of cement for the year 1936 and published in the year 1937. Will you identify that as an authentic document as put out by the Bureau of Mines?

A. Well, I thought it was only as to my portion that I can identify it. This says "By Oliver Bowles and B. W. Bagley." I think you asked me if I edited the statistics as furnished by the producers.

Q. Yes.

A. Well, this is tables and also includes text. Did you ask me if I was responsible for the whole volume?

Q. No; I merely asked you if you can identify that paper as a publication of the Bureau of Mines.

A. Exactly, yes.

Q. That contains your name as co-author. Have you already stated just what portions of it you personally prepared?

A. Well, shall we take it one by one? This is prepared from data—except the imports and exports, which were taken from data which I had edited from the various

62 producers. That is the table on page 1138. The next one is taken entirely—it had already been published under my name alone. The third one the same way; the fourth page, the fifth page, the same way; the sixth page, the seventh and the eighth pages—from the

monthly cement statements with which the producers are very familiar. And the ninth then; and then we come to another one which gives the producers' stocks as they have varied from a monthly range. That also I prepared, that is, provided it is properly copied by the printer. I did not compare the manuscript. The distribution of shipments was prepared by me, of course with assistance.

Then the next one is the same thing only in detail by months. That was taken from something already published. The next one the same way, and the next one after that; then the next one—this had all been published before.

The 1936 alone was from the estimate of the producers, because the 1936 figures which are now available, were not available at the time that this was made up. Then the ratio, the per cent of finished Portland Cement produced to manufacturing capacity, that also was taken from that; and the capacity also. This "Raw materials" were also taken from it. And the fuels, the kinds of fuels. And the totals produced by the various fuels.

Then the next one is the natural gas used in certain 63 States.

Then these others are imports and exports which are stricken apparently and they do not concern you, do they?

Mr. Wooden: All right. Well, Your Honor, I am going to offer the pamphlet as a whole with the exception of the data that begins on page 1158 under the head of "Technology", and running through the remainder of the pamphlet. This is just offered as general statistical data regarding the industry to which reference may be made from time to time, and in making the offer, however, I wish to say that we do not consider ourselves necessarily bound by the figures particularly on plant capacity on page 1153, but it is being offered merely as what the industry itself reported to the Bureau of Mines, and the Bureau of Mines published.

Mr. Leisure: Now, if Your Honor please, these statistics that are being offered here, we have not had a chance to look at them, and we may very well have no objection to their going in. On the other hand, there may be matters that we may want prolonged cross-examination upon, and we would like to have not just a statistician called by the Government, but someone that we can cross-examine, so I would like to have the opportunity over the

recess to look at this and come to some agreement as to whether or not we have an objection to its material-
64 ity at this time. Certainly it is not admissible in view of the objection, by this statistician, over objection, but we want to cooperate as much as we can, and we will not raise any objection unless it is for the purpose of cross-examination, as I have said.

Mr. Wooden: There is no objection to that on our part.

Examiner Norwood: It is just marked for identification.

(The pamphlet referred to was thereupon marked for identification "Commission Exhibit 3.")

By Mr. Wooden:

Q. Just one further question, Miss Bagley. Do the pamphlet figures of the Bureau of Mines contained in this Exhibit *3* for identification include the production of cement other than standard cement, such as higher strength?

A. Yes, they do. The higher strengths, you see—as the industry knows here—those representatives of the industry—that is a rather general statement as to what you would call historic tables in that report, as you all know, that has not been a product that has been manufactured for so very many years, so I can not answer that as to every total that is in the book. Do you see? It is taken from the reports of the producers. Those fig-
65 ures are compiled from the reports of producers which I edit.

Q. Do the figures include so-called white cement?

A. When you say "the figures", you mean the reports that are pertinent that would include white cement. I could not answer that from every table in that book. The main table that gives the production, shipment and stocks, of course in the States where white cement is manufactured, includes them as reported by the producers.

Q. Do your figures on net factory stock include the white cement, higher strength cement?

A. As reported by the producers.

Mr. Wooden: All right.

Mr. Leisure: No questions.

Examiner Norwood: We might have a ten-minute recess now.

(At this point a short recess was taken, after which the hearing was resumed.)

(Mr. Herbert W. Clark entered his appearance on behalf of Santa Cruz Portland Cement Company, Yosemite Portland Cement Corporation, Riverside Portland Cement Company and others).

66 ANDERSON H. TACKETT, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

67 I am attorney examiner for the Federal Trade Commission and have been in the employ of the Commission since its organization in 1914. In the course of my service with the Commission I directed an investigation of the cement industry concerning which investigation a
68 report was made in 1933 to the president of the Senate under Senate Resolution No. 148, 71st Congress, 3rd Session. Said report approves and incorporates my work on the subject.

(The witness Tackett was recalled on March 9, 1938 and gave further testimony).

74 BARTON W. MURRAY, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

My present business or occupation is that I have a herd of pure bred Jerseys and breed them and sell the milk.

In recent years I have not been active in the operation
75 of any other business. During 1934 and 1935 I was Deputy Administrator and later Division Administrator of NRA in which capacity the Cement Industry Code was one of 450, or so, under my supervision.

Q. What were some of the other important industries coming within those 450?

A. The automobile industry, shipbuilding, lumber, and timber products, all the electrical manufacturing in the country, the manufacture of all machinery in the country, railroad equipment, practically all the capital goods industries in the country.

Q. In the course of your duties as Deputy Administrator did you have occasion to come in contact with members and representatives of the cement industry?

A. I did.

Q. Did you come in contact with the so-called code authority for the cement industry?

A. I do not recall having come in contact with all of them as such. I may have met them individually. My principal dealings were with a Mr. Rader who was
76 chairman of the code authority.

Q. Do you know who selected the code authority?

A. No, the code was not turned over to me until after it had been approved by the President. I had nothing to do with the hearings leading up to the approval of the code.

Q. In the course of your contacts with the industry during the code did you have occasion to learn, or did you learn that the industry had a policy of selling on delivered prices?

A. Yes, I found out that they did have that policy.

Q. Will you state how the matter first came to your attention?

A. Could you amend that question and say: how it came to my attention one time? I do not really know how it first came to my attention.

Q. All right, the first time that you can recall.

A. At one time the Governor of Illinois, Mr. Horner, wrote a letter to Mr. Ickes, Secretary of the Interior, complaining against the action of the cement companies in refusing to deliver cement to the State of Illinois at the mill, and the complaint of the Governor was relayed to me. That is one instance that I recall.

Q. What did you do with it?

A. I telegraphed to the code authority and requested them to report to me what action, if any, they would
77 take with respect to changing that policy.

The witness identified Com. Ex. 6-A as appearing to be a copy of the copy of the telegram sent by him to Mr. Rader, chairman of the code authority, and said that it would not be proved by him to be the exact copy but that it was substantially what he had sent. He noticed a misspelled word and said that was the reason why he would hesitate to claim it as his telegram. Outside of the misspelled word he said it was substantially what he had sent and conveyed the meaning he had intended to convey.

He said he had had no access to the files. He believed it to be a substantially accurate copy of the message he had sent.

78 The witness identified Com. Ex. 6-B as a copy of the telegram made by the code authority for the Portland Cement Industry and that it appeared to be the one that was circularized. He said that it was a substantially correct copy of the reply he received to the other telegram.

Mr. Wooden: I offer those two papers for the record, your Honor, as Commission's Exhibits 6-A and 6-B.

Mr. Leisure: Your Honor, I do not want to make any technical objections, but here is a witness that is not positive that this is the original telegram, and I would like the opportunity of checking it in some way in order to be

79 sure that it is the telegram that was sent.

Examiner Norwood: Well, he has testified that that is a photostat of his confirmation.

The Witness: No, that is a photostatic copy of a copy made by the cement code authority for the purpose of sending it to a list of men there for information.

Mr. Wooden: The next witness, your Honor, will account for the physical paper itself.

Examiner Norwood: Yes.

Mr. Clark: Might I ask the purpose of that offer? Is it merely to show the industry had the practice of selling at delivered prices, or is to prove something else? The contents of the document, for example—I have not seen the documents, I do not know anything about them, they have not been offered to me. I take it then in the absence of the respondent—

Mr. Leisure: (Interposing) I can save time, your Honor, if it is marked as the other exhibits were, subject to our cross examination. There are so many counsel here that it is difficult to decide at this time.

Mr. Wooden: Your Honor, I should like to read for your information and for the record,—

80 Mr. Leisure: (Interposing) It has not been received in evidence.

Examiner Norwood: It is marked for identification.

Mr. Wooden: Is your Honor withholding ruling on the admissibility at this time?

Examiner Norwood: I am waiting until you answer these queries. You have a statement to make there, have you?

Mr. Wooden. I say the purpose is not merely to show the policy of the industry but to show the circumstances under which that policy was continued at this particular time. In other words, the contents of the telegrams themselves are offered.

Examiner Norwood: Yes, and counsel for respondents object to the reception of these two exhibits, do they?

Mr. Leisure: We do at this time, your Honor, until we have had a chance to look at them and check them as to correctness. We object as to materiality and the right of cross examination.

Examiner Norwood: Well, the counsel may have time to look them over.

Mr. Wooden: Your Honor, I would like to excuse Mr. Murray for a moment and put on Mr. MacIntyre for
81 further identification.

Mr. Hinds: Entirely apart from the competency of these papers, that is as to their accuracy, I would like to object on the ground that there is no relevancy so far as my particular respondent is concerned, as to any interchange of communications between the Governor of Illinois and some code authority. It is no evidence against us.

Examiner Norwood: Well, I want to explain to all the counsel that this investigation is necessarily very broad, because it involves a nationwide effect, as to the policy of these mills and a vast system of marketing, and that may not expect me to hew to the line on anything that appears to be informative. Of course, that rule will be applied to the testimony offered by both sides, but the counsel may retain that exhibit and look over it, and we can proceed.

Mr. Wooden: I would like to call Mr. MacIntyre before going ahead with Mr. Murray.

Examiner Norwood: Yes.

EVERETTE MACINTYRE, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

82 *Direct Examination by Mr. Wooden.*

I am at present connected with the Federal Trade Commission as an attorney and have been with the Commission since March 1930. I worked with the Commission

on its cement investigation that resulted in a report to the Senate in 1933 and on subsequent investigations that I conducted during 1933 and 1934 with respect to the operation of the industry at the time of the conduct of the NRA. In that connection I had occasion to examine the files of the code authority and of members of said authority.

83 The witness identified Com. Ex. 6-A and Com. Ex. 6-B as photostats of documents selected on June 7, 1934 from the files of Charles L. Hogan, president of the International Cement Corporation and a member of the Code Authority, 342 Madison Avenue, New York. He recognized those photostats as the exact papers he selected because before the photostats were made he wrote his initials on the originals. At that time the witness made arrangements with John F. Neylan, assistant general sales manager of that corporation, to have photostats made, after Mr. Neylan had entered into such an agreement with Colonel William Donovan, counsel for the Cement Institute and the code authority. Then Mr. Neylan delivered to the witness the instrument with the initials which the witness had placed on the originals and Mr. Neylan retained the originals. Those are the photostats that Mr. Neylan delivered to the witness.

Mr. Wooden: Now I renew my offer, your Honor, as to the admission of these papers.

(COM. EX. 6-A and 6-B was offered and received in evidence.)

84 Mr. Wooden: Are there any questions of Mr. MacIntyre?

Mr. Leisure: No.

Mr. Wooden: I will call Mr. Murray again.

BARTON W. MURRAY was recalled as a witness, having been previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. Wooden.

Q. Mr. Murray, will you read for the information of the Examiner and for the record, the copy of the telegram which you sent to Mr. Rader appearing as Commission's Exhibit 6-A, and then read the reply that you received from Mr. Rader, Commission's Exhibit 6-B?

A. This is addressed to B. H. Rader, chairman code authority, for the Portland Cement Industry, care Biltmore Hotel, Los Angeles. Telegram. "I have been requested by the President of the United States to encourage the manufacturers of cement to submit f. o. b. mill prices to prospective purchasers stop I urge that this question be placed before the code authority for you"—this says "for you" and I probably said "for your industry"—"industry and a report of their action thereon particularly as it affects purchases by state and federal agencies be made to this administration within the next two weeks."

85 Signed "Barton W. Murray, Deputy Administrator, National Recovery Administration."

In reply I received this telegram: "The code authority of the Cement Industry acknowledges receipt of your telegram transmitting to us the request of the President of the United States that we give urgent attention to the method of quoting prices on the product of our industry stop we have for a long period endeavored to arrive at a method which at all times and in all markets would protect the using public and prevent monopolistic tendencies stop we earnestly request your cooperation to procure for a small representation of our industry an audience to present to the President of the United States the facts as we see them which we think justify the present method of selling and quoting our products stop awaiting the further commands of the President in the premises very respectfully submitted.

"B. H. Rader, chairman code authority."

Q. Was any conference arranged as suggested there?

A. I arranged no conference between members of the industry and the President.

Q. Did you arrange a conference between members of the industry and any official of the government other than in N. R. A.?

A. No.

Q. Did the industry make any subsequent efforts

86 through you to arrange any such conference?

A. I cannot recall whether they did or not. I do recall having a discussion with Mr. Rader about the possibility of the industry acceding to the President's request and Mr. Rader's statement of the position of the industry with respect to that practice was substantially the same

as the statement made by Mr. Leisure in this morning's hearing. It did not seem to me that the industry wanted to abandon that practice and I did not feel that I should take the President's time to have them state the case to him when they did not seem inclined to want to abandon their stand.

Q. Well, did the code that you were supervising for the cement industry provide any terms for the use of delivered prices?

A. It did not. Under the code the companies would be permitted to sell in any manner in which they chose.

Q. Either delivered or f. o. b. mill?

A. Delivered at the mill or at destination or point of sale, or half way between. It limited them in no way.

Q. During the period of your duties as administrator over the cement code was there a certain article which was suspended known as article 11?

A. Yes.

Q. Can you state about when that occurred?

A. I would have to see some document.

87 Q. Just for the purpose of refreshing your recollection I show you what appears to be a mimeographed circular of the N. R. A. dated January 28, 1934. (Handing document to the witness.)

A. I do not see any date on this order which might be called effective date of the order. This is a press release and not a copy of the order which I signed.

Q. At any rate you would say that it was some time prior to the date of the press release?

A. It was prior to January 25, 1934, possibly on that date or the day before.

Q. And how long had the code been in effect at that time?

A. I would have to see that code too. May I say for the record that my appearance here is entirely unexpected and I wish to amend these remarks if they are later questioned by having submitted for the record some documents from the files of N. R. A., or Portland Cement Association, or Federal Trade Commission. I am depending entirely on my memory and the actions took place more than three years ago.

Q. That is all right.

A. What was the question?

Q. The question was how long had article 11 been in effect before it was suspended?

A. Approximately two months; less than two months.

88 Q. And was article 11 ever restored to the code?

A. Not during the time that the code was under my jurisdiction.

Q. And when did you cease to have any connection with the cement code?

A. On the date that the cement code was transferred from Division 2, of which I was Division Administrator, into Division 1. I wrote a letter to the Federal Trade Commission announcing that fact, so that if there happened to be any investigation at any other time I would be clear of any responsibility, and that letter would undoubtedly be in the files of the Federal Trade Commission. I do not know what the date was.

Q. Now regarding this matter of Governor Horner's request for an f. o. b. mill price on the part of the industry, did you have any direct negotiations with the industry on that?

A. Not with the industry.

Q. Or with the code authority?

A. I discussed it with the chairman of the code authority, Mr. Rader.

Q. With what result?

A. I believe I covered that in answer to your previous question.

Q. Mr. Rader I believe you testified was chair-

89 man of the code authority?

A. That is correct.

Q. Do you know whether or not the code authority was chosen—do you know how it was chosen, by whom?

A. It was chosen before I took the code over. I believe the code itself outlines the method by which the code authority should be chosen.

Mr. Wooden: It does, and I think there will be no objection to my statement, just for the record at this time. It provided it should be chosen by the cement industry.

By Mr. Wooden:

Q. Was there any other government purchasing agency than the Interior Department that brought up this matter of the industry's delivered price policy?

A. To me?

Q. Yes.

A. Yes, the War Department objected to it and asked me what I could do about it, I believe.

Q. Is that about the same time as these other requests?

A. I believe it was before the request from the President.

Q. What steps did you take to carry out the requests of the War Department?

A. I appointed Lieutenant Colonel Harris, who was the regular Army officer and in the Office of the Assistant
90 Secretary of War, as my representative on the code authority for that industry.

Q. What was the outcome?

A. Colonel Harris attended meetings of the code authority and was in a better position than I to observe what the action was with respect to the invitations of the War Department to bid.

Q. As far as you know did the industry accede to the requests of the War Department regarding mill prices?

A. I would not be prepared to answer that.

Q. You do not know?

A. I do not know.

Q. Did the request of the Governor of Illinois for f. o. b. mill prices come direct to you or through some other channel?

A. No, that request was made—it really was not a request to me by the Governor of Illinois. The Governor of Illinois wrote a letter to Mr. Ickes and in that letter he complained about the actions of the cement companies with respect to f. o. b. mill, and Mr. Ickes brought the letter to the President, and on the top of the letter the President apparently written in longhand, wrote "F. D. R.," apparently written to me and signed "F. D. R.," was to the effect that I should permit and encourage the industry to accede to the request of the Governor, or to get f. o. b.—I would much rather have the copy than depend on my memory.

91 Q. It was as the result of that that you sent that telegram?

A. As the result of the President's notation on the letter sent to Mr. Ickes I sent the telegram to Mr. Rader.

Q. I notice you did not use the word "permit" in your letter but merely "encouraged."

A. Well, for the reason that I wrote to Mr. Marvin McIntire, secretary to the President, that the code did

not place any restrictions on them and that the members of the industry were permitted, if they so wished, to bid in any way they wanted to and I had no authority to compel them. It seems to me the impression was in the mind of the Governor of Illinois that I had some authority over the industry. That was not the case. There was no authority under the National Industrial Recovery Act which would permit me, or any other official, to compel any action on the part of any member of the industry.

Q. When you say "not compel" you mean not compel under the code, is that correct?

A. Not compel adherence to the code.

Q. But the code itself did not compel selling in any one particular manner, f. o. b. mill or delivered?

A. That is right.

Mr. Wooden: That is all.

Mr. Leisure: Just one question.

92 *Cross-Examination by Mr. Leisure.*

Q. You understand, of course, when Governor Horner was talking about a delivered price that he was talking about purchases by governmental agencies, that is by the State?

A. By the State of Illinois, that is my understanding.

Q. Now in your considerable experience in dealing with the cement code can you recall a single instance when a private individual complained about receiving delivered prices or purchasing at delivered prices?

A. I do not recall any offhand.

Q. Now you had considerable opportunity in the work surely, as a code administrator, to observe the workings of the industry that came under your supervision. Did you or did you not observe considerable competition existing in the cement industry during your supervision?

A. Yes. I felt that there was competition in the cement industry, for this reason, that members of the code authority complained to the National Recovery Administration that other members of the industry—

Mr. Wooden: (Interposing) Your Honor, I would like to interpose an objection. I have not gone into that question with this witness, the question of general conditions of competition, but merely the subject of the indus-

try's refusal to sell at other than the delivered prices,
93 and this, to my mind, is going into what you might say the general field of the industry's own case, the respondents' own case, and should be deferred until their case is ready.

Mr. Leisure: Now surely your Honor is interested in the truth from whatever source it may come, whether it comes from the government witnesses or from our own witnesses.

Examiner Norwood: It is just a question of whether this is bringing in your case and whether it is not proper cross-examination.

Mr. Leisure: It is tied up, I am sure, your Honor, with these telegrams.

Examiner Norwood: I think so.

Mr. Leisure: Here is a man that testifies to his experience as to what the government wants. Surely we may ask him the entire story as to what he observed within the issues of the pleadings in this case. So surely the government cannot call a witness and just bring out what it would like to bring out.

Examiner Norwood: This is cross-examination. I think I will overrule the objection. Read the question, Mr. Reporter.

(The question and answer were read as follows:

94 "Now you had considerable opportunity in the work surely as a code administrator to observe the workings of the industries that came under your supervision. Did you or did you not observe considerable competition existing in the cement industry during your supervision? Answer. Yes. I felt that there was competition in the cement industry for this reason, that members of the code authority complained to the National Recovery Administration that other members of the industry—")

By Mr. Leisure:

Q. Will you just complete your answer, please?

A. (Continuing) —were not living up to the code. I might enlarge on that by saying in the National Recovery Administration there was a compliance division set up to receive complaints against members of the industry under codes and that the cement code authority complained to the compliance division that members of the industry were not complying with the code. I am trying to anticipate a

possibility of being quoted as saying that there was competition in the cement industry, and I am giving the reason for my statement. It was made at a public hearing. Then the chairman of the code authority complained to me that the compliance division of N. R. A. was slow in prosecuting the violators of the code and for that reason he
95 said the code itself was being made valueless to them as a means of insuring fair competition.

Mr. Leisure: That is all. Thank you, Mr. Murray.

Examiner Norwood: Anything further?

Mr. Wooden: Just a minute.

Redirect Examination by Mr. Wooden.

Q. I take it that is the only basis upon which you reached your conclusion that there was competition in the industry, because of these complaints that the code authority was making to you?

A. That was the only basis that I had for the statement.

Mr. Wooden: That is all.

Mr. Leisure: Just one other question.

Recross Examination by Mr. Leisure.

Q. With reference to your last answer, if there had been any special need for amendments to the code you had that authority to call meetings and provide for such amendments, did you not?

A. It was not the policy of N. R. A. to call meetings of the industry, it was rather the policy to have the industry propose amendments.

Q. You had the authority to provide for amend-
96 ments which you thought were necessary in that way?

A. Well, the authority was there, but it was never exercised. There was no imposition of a code, or an amendment, on any industry. The industry presented its code and it if was not satisfactory to the government the code was negotiated with the members of the industry and the labor groups and consumers advisory boards until something satisfactory to all was arrived at, and then approved.

Q. Well, now, just one further question. Did you yourself propose any amendments to the cement industry code?

A. No, at no time did I propose any amendment.

Mr. Leisure: That is all.

Mr. Wooden: Just one more question.

By Mr. Wooden:

Q. Did you feel that you had the authority to impose any amendments to the code on the industry without its consent?

A. There was a provision in the National Industrial Recovery Act which gave that authority, but, as I said before, it was the policy of the Administration not to impose a code.

Mr. Wooden: That is all. Thank you.

(Witness excused.)

EVERETTE MACINTYRE was recalled as a witness on behalf of the Commission, and having been previ-
97 ously duly sworn, was examined and testified further as follows:

Direct Examination (Continued)

Mr. Wooden: I would like to have these marked Commission's Exhibits 7-A, 7-B, and 7-C.

(The documents were marked "Commission's Exhibits 7-A, 7-B, and 7-C for identification.")

By Mr. Wooden:

Q. Mr. MacIntyre, I show you now two documents marked for identification as Commission's Exhibits 7-A, 7-B, and 7-C, and will ask you to state what you know about them and your connection with them.

A. These constitute three pieces of documentary material that I extracted from the files of Mr. Charles L. Hogan, president of the International Cement Coroporation and an official of the Cement Institute, that is, a member of the code authority, 342 Madison Avenue, New York, on June 7, 1934.

Q. Are the two documents related to each other in any way?

A. Yes. One is a two-page letter signed "John Treanor" to Mr. B. H. Rader, that is, it is a copy of that letter dated May 17, 1934, and the other appears to be a reply to that under date of May 21, 1934.

Q. How do you know those papers to be exact documents, or photostats of the exact documents that you
98 found in those files?

A. They bear notations in my handwriting which I placed on the originals before the photostats were made of the originals, before these photostats were made of the originals I placed those notations on the originals in the office of Mr. John F. Neylan of the International Cement Corporation, and he then, after conference with attorney William Donovan, made arrangements for me to secure from Mr. Neylan the photostats, and these are the photostats that I secured.

Mr. Wooden: I offer them for the record, your Honor.

Mr. Leisure: May I just ask a question on the voir dire, if your Honor please?

Examiner Norwood: Yes.

By Mr. Leisure:

Q. Mr. MacIntyre, the date that you made this investigation, when did you say that was?

A. That was June 7, 1934. I interviewed and examined the files of Mr. Hogan on June 6 and 7.

Q. So that in 1934 you were working on this particular investigation and gathering this particular information?

A. That is correct.

Q. Now you say you extracted these from the files. You do not want his Honor to understand any innuendo
99 from that that the files were not made open to you, that they did not cooperate with you in getting photostats, allowing you to come in and getting anything that you wanted, is that true?

A. I was permited by Mr. Hogan to examine these particular files. From those files I selected this material.

Q. They were given to you freely, you were allowed to photostat them and bring them back with you, isn't that correct?

A. Not entirely. Mr. Hogan, of course, has always been cooperative, but he said in view of the fact that he at that time was an official of the Institute, in the capacity indicated in those letters, he would much prefer, before he turned over the original, to confer with counsel, that is Colonel Donovan.

Q. Precisely.

A. (Continuing) And get advice as to whether he should

turn them over, as well as the advice from Mr. Rader, who was chairman of the code authority in Chicago, and which he did, and after of course conferring with counsel they agreed not to let me have the originals but photostats of the originals, and those are the photostate.

Q. And you are satisfied with the photostats; with having photostats of the originals?

100 A. Yes, I am satisfied those are photostats of the originals that I selected.

Q. You of course know, or it has come to your attention either since then or at that time, that the author of these letters is now deceased?

A. I have no direct knowledge of that.

Q. You haven't any doubt, have you?

A. Well, I do not know whether he is or not.

Q. Have you ever heard from anybody, has anybody told you that?

A. I have heard people say that they had heard that he is dead.

Q. But you would not say in your testimony today that Mr. John Treanor is not now living?

A. Only through rumor and gossip in this community.

Q. Now have you any doubt as to the accuracy of that hearsay in your mind today?

101 A. I have no reason to doubt its accuracy.

Q. You have no reason to doubt it?

A. I do not, the same as any other gossip, or by rumor in the community.

Mr. Leisure: Your Honor, I object to this exhibit, first because they are incompetent, irrelevant and immaterial and do not prove or tend to prove any of the allegations in the complaint. Upon the further ground, or for the further reason that they are written by a man who is now deceaced, which cannot possibly bind any of these defendants today. I object to the exhibit.

103 Mr. Zimmerman: (Interrupting.) If your Honor please, I should like to interpose the further objection and that is that the documents do not purport to be any official communications authorized by the Institute, and no individual member certainly has any right to bind either the Institute or the other members thereof. There is no connection whatever between Mr. Treanor, the individual, and the Institute as such under the articles of associa-

104 tion and the other individual members of the Institute. If this is admissible at all it would be only ad-

missible so far as any particular action against Mr. Treanor or his particular company is concerned, and that does not seem to be the basis of the complaint.

Mr. Clark: Mr. Examiner, may I offer an objection also on behalf of the Riverside Portland Cement Company? I object to it, I object to the admission of that document or those documents in evidence on the ground they are incompetent and irrelevant, and it appears clearly on the basis of the instruments themselves that they are the personal statements of the man who wrote them. The president of the Riverside Portland Cement Company—even his company would not be bound in the present state of the record by those documents, or by the contents of them.

In addition to that I wish to object to them on the ground that there is no foundation laid, no connection made between the documents and the individual who wrote them and any other company in the case, and therefore they are incompetent, irrelevant and immaterial, and I object to them for those reasons.

106 Mr. Leisure: My objection goes to whether or not they are originals. I understand they are not.

Mr. Leisure: They are not the best evidence if the original is in existence.

107 Examiner Norwood: I think I will reverse the ruling receiving them and they are marked for identification and can be used here in the examination for further information in regard to them.

Mr. Wooden: Your Honor, I understood that we were not going to have that difficulty raised in this case, as to the production of original documents provided copies were substantially vouched for and appear to be correct, and that they would be subject to check.

Examiner Norwood: So far as I know this may be a copy of copies.

Mr. Leisure: That is just what we are asking about, that is just what he says.

Mr. Wooden: I want them used as received in evidence.

Examiner Norwood: Well, they are not received. I reversed that, in view of this other objection.

108 After Recess.

The hearing was resumed at 2 o'clock p. m., pursuant to the taking of the noon recess.

Examiner Norwood: The hearing will come to order.

Mr. Wooden: I have a few more questions that I would like to ask Mr. McIntyre, Your Honor.

EVERETT MAC INTYRE resumed the witness stand on behalf of the Commission, and testified further as follows:

Direct Examination by Mr. Wooden.

Q. Mr. MacIntyre, I am showing you Commission's Exhibit for Identification 7-A, B and C, and will ask you whether you made any attempts after obtaining those papers to locate the originals in any other files than those of Mr. Hogan from which they were taken?

A. I did. Subsequent to examining Mr. Hogan's files, I visited Mr. Coffin of the Nazareth Cement Company, who was also a member of the Code Authority and endeavored to locate the originals after an examination of his files, and I moved on to Chicago and examined the files of Mr. B. H. Rader, Chairman of the Code Authority, in Room 806 of the Conway Building, No. 111 West Washington Street, Chicago, and throughout the period of June 11 to June 22, 1934, I conducted my investigation of his files 109 and certain price files that he had, but I failed to locate the original of the letter of Mr. Treanor to Mr. Rader, or Mr. Rader's file copy of his letter to Mr. Treanor in reply thereto.

Q. Did you have those documents particularly in mind in conducting the examination of Mr. Rader's files?

A. I did.

Q. Did you have an conversation with Mr. Rader as to Mr. Treanor's standing or status in the industry?

A. I did. I questioned Mr. Radar, of course, as to various members of the Code Authority as well as members of the Board of Trustees of the Institute, and I gathered from him—

Mr. Leisure: (Interrupting.) If the Court please, I do not want to make any unnecessary objections, but I think these men are both lawyers, and they know well that hearsay evidence of what they discussed, without the authority of some party concerned, is not the best evidence. This is hearsay.

Examiner Norwood: This testimony is to bring out the circumstances surrounding this paper and show his efforts to get the original. I think he can have the witness give a complete explanation.

Mr. Wooden: He did start to say he "gathered". I

don't care to have him testify to what he gathered, but I want him to testify to what Mr. Rader told him on the subject.

112 Mr. Leisure: Your Honor, our objection on this particular evidence goes to the admissibility partly because the man who wrote it is now deceased, and it would be impossible if he were called as a witness, for him to give opinion evidence such as is expressed in this letter, so that any charge of conspiracy, it seems to me, should not extend broadly, or to any broader extent when a letter is now being offered by a deceased man, unless the groundwork is laid that the letter is some act in furtherance of the conspiracy. Surely a mere admission by one de-

113 fendant or one man who is not even named as a conspirator or defendant can not be offered against all of these other respondents at the present time. It is not material or relevant. If it went to the extent of being some act in furtherance of a conspiracy, and if the Government had already established that there was a conspiracy existing, even then this letter would not be admissible, because the mere admission would only be binding against the man who wrote the letter, and he is not named as a defendant or as a conspirator; so it seems to me the letter can never be connected up and should never be admitted.

Examiner Norwood: As I understand it, he is offering to show the attitude of some members of the industry to this entire question.

Mr. Leisure: Yes. That is just my point. And it is not admissible against any of the members of the industry. They are not bound by his expressions of opinion. If this man were doing some act in furtherance of the conspiracy, then that act or that letter that expresses the act would be admissible as a part of the conspiracy, but a mere admission—and as I understand it Mr. Wooden has not answered the question which was put to him by the counsel for Riverside, on what theory he offered the letter.

114 The question has not been answered. At best it is an admission against interest, and a mere admission against interest, not an act in furtherance of the conspiracy, is certainly not admissible against the rest of the defendants in this case.

Examiner Norwood: It would be admissible against his company, wouldn't it?

Mr. Leisure: No, it would not bind his company,—a personal expression, an expression of opinion,—he could not even bind his own company. All it would do is to bind himself, and the man is not named as a defendant, he is not named as a conspirator, he is now dead. So there is no basis in any way that the letter can be admitted as material evidence in this case.

Mr. Wooden: Your Honor, I contend that the letters are admissible whether they are mere admissions or whether they constitute acts of the writer of the letter. I propose to show the status and standing of the man in the industry, that wrote the letter. It is a part of the acts of the industry, of the Code Authority of the industry, of the Cement Institute, of which this man was a high official; and to argue that it is merely his personal expression—of course, everybody's expression is personal, but it frequently goes beyond a personal responsibility and
115 makes his associates responsible, if he is engaged with them in a common activity.

Examiner Norwood: I agree with you. The only objection that I considered was as to the matter of its being a copy, and since the noon hour I have read those exhibits very carefully and I believe them to be admissible.

Mr. Leisure: We do not want to make any captious objection on the ground that the exhibit is a copy. I have talked with counsel. There was such a letter written, and I understand that it was in one of the answers, so that we are not raising any objection on the technical ground of the letter being a copy. We object to the letter being offered as an expression of opinion against other members of the industry.

Examiner Norwood: Well, I shall receive it in evidence, and then the counsel has his exception, and all of these points can be thrashed out before the Commission.

As I have said, this investigation must necessarily be very broad, and the attitude of some members of the industry to it may be of some weight, and we will consider all of it.

Therefore, Commission's Exhibit 7-A, B and C are received in evidence at this time and so marked.

116 (COM. EX. 7-A, B and C, was offered and received in evidence.)

Mr. Wooden: Your Honor, I should like to read for the record, these exhibits.

Examiner Norwood: I should like to ask this witness one thing there. That Exhibit 7-C indicates that the original was signed "Chairman". Who signed that? On the face of it it shows it to be a reply to the other letter. I would like this witness to tell what he knows about that.

The Witness: It does not carry a signature,—only the word "Chairman", but it is initialled "BHR:E". Mr. B. H. Rader's initials, the chairman of the Code Authority, are "B. H. R.", and he frequently signed his letters which I picked up in the field, in such manner.

Mr. Wooden: Commission's Exhibit 7-A, a letter dated May 17, 1934, addressed to B. H. Rader, Regional Manager, The Cement Institute:

"Dear Bud:

"I have been thinking about your telephone call, from which I get the impression that you sent a pretty unyielding telegram to Murray—as you say at least that you 'did not intend to make any concession before the "trad-
117 ing" starts.'"

I refer to the Murray telegram that we had in evidence this morning. (Continuing:)

"Now I would have conceded the mill price at once on Federal business and I would have indicated a very open-minded attitude toward the larger question; and this to create the impression, deliberately, that something besides obstruction and short range trading can be had out of the cement industry. I would have taken advantage of this great opportunity to lay a telegram on the President's desk which he would have read. We know he is watching the cement question. I would have tried to strike a new note of cooperation and reasonableness, in contrast with what Ickes and the Federal Trade Commission tell him about us. This could have been the beginning of a real campaign for that is why I am writing you. The only thing that I think has been lost is a neat opportunity to score our point with the President himself.

"As a member of this industry, my fate is to a considerable extent in your hands, so that I have both a right and a duty to let you know my views.

"If we were a generally well regarded industry, we might be justified in taking a stiff trading position upon the President's request. However, we are anything but
118 popular, we have a very difficult position to maneuver out of, and we should not gamble unnecessarily, run-

ning as we do the risk of a blast from the President's office that may be ruinous.

"The f.o.b. mill price on Federal business is of no real importance, is entirely practical to grant, can and I think will be forced out of us—therefore good trading would have been to give it without any trading.

"Now, when it comes to the larger question of mill price on commercial business, much as I would like to think otherwise, I am convinced that we will have to maintain our basing point position and refuse the President's request. It will not be an easy refusal to defend upon economic grounds. It will be almost impossible to persuade an unsympathic government that we are justified in our refusal. But the least we can do is to prepare the way by an initial showing of open mindedness, which might entitle our later argument to sympathetic hearing.

"Do you think any of the arguments for the basing point system, which we have thus far advanced, will around anything but derision in and out of the government? I have read them all recently. Some of them are very clever
119 and ingenious. They amount to this however: that we price this way in order to discourage monopolistic practices and to preserve free competition, etc. This is sheer bunk and hypocrisy. The truth is of course—and there can be no serious, respectable discussion of our case unless this is acknowledged—that ours is an industry above all others that can not stand free competition, that must systematically restrain competition or be ruined. We sell in a buyers' market all the time. The capital cost, as distinguished from the out-of-pocket cost, of producing cement is extraordinarily large. In free competition this capital cost is whittled away and this means loss and ruin.

"Now an industry in this fix needs some sympathetic understanding on the part of the government. I think our case can be made out, but it is not going to be done by the route of hard boiled short-range trading. We are either dealing with a very important large question of public relations or we are not. If we are not, we don't have to be so careful of our methods. If we are, then we had better approach the question in a large way; and the first approach is to acquire some good will in governmental quarters. All that we need for our reasonable prosperity is consistence with the President's original
120 plan for NRA.

"I haven't seen the telegram you sent. This letter

may be unwarranted and is pretty sure to make you sore, but it is based upon your remark about 'trading' and upon some general views of industry policy which I heard advanced by some of the very influential men of our industry.

"Yours truly,
(Signed) John Treanor."

On May 21, Mr. Rader replied to Mr. Treanor's letter just read and says:

"Dear Mr. Treanor:

"I have your letter of the 17th, and I am going to answer the last paragraph first by stating to you that your letter is not going to make me sore, but it makes me feel bad to think that any one man in our Industry feels that he must give in immediately on any request from the Government without attempting to work the matter out in a way that would be beneficial to the entire Industry.

"The Code Authority members feel that they sent the proper kind of a telegram. It is not arbitrary, but it is not giving everything they ask for without a chance to explain it.

"In talking to Washington this morning, I find 121 they were very well pleased with the telegram and stated they would arrange a meeting for me any time I called for it.

"Yours very truly,
Chairman."

Down below is noted "Copies to C. L. Hogan, J. B. John, G. F. Coffin, M. C. Monday, L. T. Sunderland, R. B. Henderson, E. P. Lucas."

129 WALTER B. FRY, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am purchasing officer for the Department of the Interior and have occupied that position since January 4, 1932. Prior to that time, and from 1909, I was chief of the purchase division of the Indian Office. My duties as pur-

chasing officer of the Department of the Interior have been to procure for the various branches of the Department such articles as they may need both for Washington and the field.

Q. Will you describe in a general way what your duties have been as the purchasing officer of the Department?

A. Well, to procure for the various branches of the Interior Department, such articles as they may need both for Washington and the field.

130 Q. And what is the ordinary procedure that is used in making purchase for the Department?

A. Well, the most common procedure is to receive a request or a requisition for the purchase of some commodity and then proceed to advertise for it according to the law. On receipt of the bids, we abstract them and analyze them, and from that make an award and a contract.

Q. You say you advertise for them under the law. What law do you refer to?

A. Section 3709 of the Revised Statutes.

Q. And what does that require you to do?

A. It simply requires us to advertise for the purpose of getting competition.

Q. How long has that law been in effect?

A. I could not tell you the year, but it was long before I started.

Q. Do you supervise the purchases of all branches of the Interior Department or are some branches allowed to handle their own purchases?

A. Some are allowed to handle their own. The Reclamation Service particularly.

Q. And that has been true for some time, has it?

A. Ever since we started. In fact, they were never taken into our central purchasing set-up for the field purchases. We do handle a little in the city here for

131 the Reclamation Service.

Q. To what extent have you handled the purchase of cement for the Interior Department?

A. Well largely for the Indian Service.

Q. Have you had contacts at times or collaboration with the Reclamation Bureau with reference to cement purchases?

A. We have had some contacts, yes.

Q. Has there been any time when the awards on cement bids were turned over to you for handling by the Reclamation Service?

A. We have gotten into most of those cases when there happened to be such a tie bid as would have to make a drawing on it. On their recommendation to the Secretary, it was referred to me for the drawing.

Q. And you had occasions to make drawings in that way on the purchasing of cement?

A. Not frequently. There may have been some cases. I cannot recall offhand.

Q. But as to the Indian Service and other branches of the Interior Department, do I understand that you have handled those purchases of cement direct?

A. Yes, Indian particularly.

Q. Have you used the method of awarding bids by lot in regard to cement purchased for the Interior Department?

A. Generally I would say no. I do not think we
132 have, but I would not be sure.

Q. Have you examined the bids as they came in on cement before awards were made?

A. For the Indian Service?

Q. Yes.

A. Yes.

Q. What has been your experience with reference as to whether those bids were on the basis of delivered prices or on f. o. b. mill prices?

A. Generally on delivered prices.

Q. Have you made in your specifications or otherwise in your invitations, requests for bids on f. o. b. mill basis?

A. Yes. Both ways.

Q. To what extent have you received bids on straight f. o. b. mill basis?

A. I cannot remember getting any lately and for a number of years. Not since the code started, any way.

Q. Do you mean to say that your requests for bids f. o. b. mill are ignored?

Mr. Leisure: Now, if your Honor please, I have allowed that to go very far afield here, because I did not want to obstruct in any way. Of course, the best evidence is the bids. As to how they came in, it is the bids themselves and not this witness' recollection. He is going to now

argue with the witness. He asked, "Do you mean
133 to say," and I think we must object to that examination. He said he can not remember any since the code. How do we know what happened before the code? Let us see the bids. I object.

Mr. Wooden: I think, your Honor, that this witness is entitled to state the result of his own experience in the handling of these matters as distinguished from the details of the bids themselves.

By Mr. Wooden:

Q. Do you have available any of the bids relating to cement?

A. Not the bids themselves, because the bids have to be filed under the law, and they are in the Department. I have abstracts of some of them here.

Q. Will you produce them?

A. (Producing papers.)

Examiner Norwood: Do the respondents deny that identical bids were received?

Mr. Leisure: The point of my objection was that the witness said, "Not for some time." As I draw the inference from that, or someone might draw the inference that there might be some agreement since the code days and the system was changed. Now, let us see whether
134 the system was changed or not. Let us see if it was not always that way.

Examiner Norwood: You can bring that out.

By Mr. Wooden:

Q. You have produced here, Mr. Fry, a number of papers, I take it from the files of your department.

A. Yes, sir.

Q. Bearing upon bids for cement purchased by the Indian Service, is that correct?

A. Yes.

Q. And do these papers contain the results of the bidding together with the names of the bidders and the prices bid?

A. Yes.

Q. And the awards made?

A. This one happens to be only one bid. (Indicating.)

Q. Are these the papers upon which you predicated your official action in making the awards?

A. They are.

Q. Will you give us for the record, refreshing your recollection wherever necessary from these official papers, just what the project was, the bidders, and the amount bid, and the awards made?

A. In that particular case, the proposed purchase was 160 barrels of cement for the Pyma Indian Agency down in Arizona.

Q. And the date?

A. The bids were opened January 10, 1935.

135 Q. That was under the code? That was during the code period?

A. I think so.

Q. Will you state what the bids were and by whom made?

A. We received only one bid on this case.

Q. In that case, I will not ask you anything further. We will take up the next one.

A. Here is one under date of July 6, 1937—this is rather recent—which we received eight bids on. This was for the Kiowa Indian Agency, Oklahoma. We received eight bids.

Q. Who were the bidders and what did they bid?

A. The Dewey Portland Cement Company, Kansas City, the Lehigh Portland Cement Company, Kansas City, the Universal Atlas Cement Company, Kansas City, Monarch Cement Company, Humboldt, Kansas, Oklahoma Portland Cement Company, Oklahoma City, Oklahoma,—all those bid $774 delivered Anadarco, Oklahoma.

Q. What was the quantity involved?

A. I have not finished the prices yet. Then Harry Brown Lumber Company of Anadarco; Antrim Lumber Company of Anadarco; Rounds & Porter Lumber Company of Anadarco,—those three bids $831. The amount was 1200 sacks.

Q. Do you know whether those were mills or dealers,—the last three?

A. All three are lumber companies. I do not sup-

136 pose they are mills, but I don't know up there.

Q. Does your knowledge permit you to state the shipping point from which those bidders were to ship?

A. Yes. The first five, anyway. The record does not show the others. The Dewey Portland Cement Company shipped from Dewey, Oklahoma; Lehigh from Iola, Kansas; Universal from Independence, Kansas; Monarch from

Humboldt, Kansas, and the Oklahoma Portland from Ada, Oklahoma.

Q. Do your papers permit you to state in that case whether request was made for a price f. o. b. mill or not?

A. The advertisement or the invitation for bids, rather, states, "For furnishing the following supplies and or services for delivery either (1) f. o. b. Anadarco, Oklahoma, or, (2) f. o. b. bidder's shipping point to be named."

Q. Did you get any bids on the basis of the bidder's shipping point?

A. No, sir.

Q. Will you take up another case and give us a digest of the information similar to what you have done in that one case?

A. This is a case involving a purchase of 1200 sacks of cement for Shawnee Indian Agency, Shawnee, Oklahoma. We had four bids—Dewey Portland Cement Company of Kansas City; Monarch Cement Company of Humboldt, Kansas; Oklahoma Portland Cement Company
137 of Oklahoma City, Oklahoma; Universal Atlas Cement Company of Kansas City. The destination for us is Shawnee, Oklahoma, and the price bid by Dewey—

Mr. Leisure: (Interposing.) Would you fix the date, please?

The Witness: Yes. October 8, 1937.

The price bid—the way these bidders have put in the price is 60½ cents per sack on commercial bill-of-lading and 60 cents on government bill-of-lading, a difference of a half a cent, and those prices are quoted by Dewey, Monarch, and Universal. And this is one of the two cases we have had of late where some bidder cut the price.

By Mr. Wooden:

Q. How late?

A. The bid was opened October 8th. I have not seen the other case. I was told this morning that there was another case in the office. In this case, the Oklahoma Portland Cement Company quoted 60½ cents, the same as the others on commercial bill-of-lading, but cut the government bill-of-lading price to .5975.

Q. Are there two delivered prices quoted there,—one so-called commercial delivery, and the other government destination point? Is that what that means?

A. Yes, sir. In other words, apparently the in-
138 tention is to give us half a cent per bag or sack discount for shipping on a government bill-of-lading.

Q. All right. Did you give the shipping points?

A. The shipping points are, Dewey was to ship from Dewey, Oklahoma, Monarch from Humboldt, Kansas, Oklahoma Portland Cement from Ada, Oklahoma, Universal from Independence, Kansas.

Q. All right. Do you have another case?

A. In this case the award was made to the low bidder.

Q. And you stated who that was?

A. Yes.

Q. Now, do you have another case?

A. Yes. In this case we were buying 3,000 barrels of Portland cement for public works construction at Gallup, New Mexico. That is about as close as we can get it.

Mr. Leisure: Your Honor, on all of these documents I would like to have the witness fix the date first. I notice that the last exhibit that he read from came after the filing of the complaint, so it would not strictly be admissible in this case, but I did not want to make any objection.

The Witness: This one is October 14th.

Mr. Leisure: I would like not only to have the date fixed, but I would like to have the exhibit marked so that
139 we will have an opportunity subsequently—marked for identification at least—so that we will have an opportunity to examine them in connection with the testimony.

Examiner Norwood: As I understand it, he is merely refreshing his recollection from these papers.

Mr. Wooden: I was not proposing to offer the papers.

Mr. Leisure: I was not suggesting that they be offered, but I would like to have the papers from which he refreshes his memory, marked for identification so that we may in turn examine them and find whether his memory was refreshed correctly, if we care to do so.

Examiner Norwood: If he is going to do so, I should like the offer made as near his explanation as possible to save me a good deal of trouble.

Mr. Leisure: I would like to have the others marked also if we may. We have no way now of checking from the records from which he is reading.

The Witness: I have been reading from the long sheet in here. It is the only long sheet in the file.

Mr. Wooden: I should think the description he gives, and the date and the amount and the bidders should be sufficient to answer your purpose there.

Mr. Leisure: Possibly it will. I have never seen
140 these papers before.

Examiner Norwood: I think the counsel can straighten that out.

The Witness: The date of this one is October 14, 1935, the date on which the bids were opened.

In this one we have five bids. The amount was 3,000 barrels. The first bid is the Southwestern Portland Cement Company, Los Angeles; the next one, The Colorado Portland Cement Company, Denver; another Southwestern Portland Cement Company, El Paso; Henry Cowell Lime & Cement Company, San Francisco; Monarch Cement Company of Humboldt, Kansas. The price quoted by the Southwestern of Los Angeles, and the Colorado and the other Southwestern of El Paso and the Monarch are the same on commercial bills-of-lading. Two of them here apparently quited only on shipment by government bills-of-lading. They quote $7,618.50 as against $9,510 for commercial bill-of-lading shipment. The Monarch Company bids both ways.

That gives us four prices on commercial bills-of-lading at $9,510, and two prices on government bills-of-lading at $7,618.50.

By Mr. Wooden:

Q. To whom was the award made?

A. The award was made to Henry Cowell on government bill-of-lading, $7,618.50.

141 Q. How was the award determined?

A. The award was determined in this case by deducting the commercial freight back to the shipping point. That is the way it was done by deducting the commercial freight back to the shipping point.

Q. Deducting the commercial freight from what?

A. From the gross quoted price.

Q. And what was the gross price from which it was deducted? Was it the government destination price or the other delivered price?

A. No, I will have to change that. This record is kind

of garbled a little. On those prices of $9,510, the commercial freight was deducted and the government freight added back to show what the cost was at destination. On the one who got the award, they figured the freight and added it to the cost per barrel which the bidder Cowell quoted to give the cost to destination, and those destination costs as they were figured net, is: Cowell 1.851567; Monarch on government bill-of-lading 1.99916926; Southwestern 2.96613893, and the other Southwestern bid is the same. The Monarch bid on commercial bill-of-lading was 2.62966926. The last bid was not figured out. The Colorado Portland Cement.

Q. Do I understand you to say that the commercial rate was deducted from the government destination bid in that case?

142 A. Government destination?

Q. Yes.

A. No. From the price quoted. Not on Cowell. I made that statement first but corrected it. On the bid that we accepted, that bidder did not quote for shipment on government bill-of-lading. He quoted only one price.

Q. Now, Mr. Fry, is there anything used in that case in connection with the so-called control clause? Do you know what I mean?

A. Do you mean by the bidders?

Q. Yes.

A. The bids are not here. I cannot tell.

Q. All right.

A. You would have to get the original bids to determine that. There are clauses typewritten here too. (Examining papers.) One bidder states: "The above is the destination cost for Gallup, New Mexico, for shipment on United States Government bill-of-lading." It is rather long; do you want me to repeat them?

Q. Yes. I think that will come out again and again in the course of the hearing, and we may as well have it the first time it comes up.

A. Frankly, from this abstract, I cannot tell which one that note applies to. It is "A". This relates to the Cowill bid: "The above is the destination cost for Gal-

143 lup, New Mexico for shipment on United States Government bill-of-lading, and the United States Government shall determine its cost f. o. b. Cowell, California, for invoicing purposes on shipments moving on United States

Government bill-of-lading to this destination only. By subtracting from the within-named destination cost to the United States Government the land grant rate as determined by the United States Government as being applicable from Cowell to said destination or the actual commercial freight rate or special United States Government rate applicable from Cowell to destination named, whichever rate is the lowest. Prices named herein subject to withdrawal on five days' notice. The within-price applies for shipment in carload lots, minimum 160 barrels.''

May I make a statement there?

Examiner Norwood: Yes.

The Witness: Pardon me. I have got to correct my statement on the question you asked. You asked if they deducted commercial freight on that?

By Mr. Wooden:

Q. Yes.

A. I see they did.

Q. They deducted commercial freight from government destination?

A. They deducted 1.957 as a commercial freight 144 from the price per barrel rate from the price per barrel quoted us delivered.

Q. On government bill-of-lading?

A. Well, this stipulation is it is shipped by government bill-of-lading.

Q. Then the deduction would have been made from that?

A. Apparently the price quoted was using commercial freight rate in cost laid down, so we have deducted the commercial freight rate, and then added back the government rate to make our net price at destination of 1.85-and so on.

Q. In so doing, did you disregard that clause which you read?

A. Yes.

Q. In other words, you paid no attention to that clause, is that correct?

A. Yes.

Q. And ignored it and deducted the commercial rate instead?

A. We did, yes.

Q. Was any appeal taken from your action in that matter?

A. Yes. There is a subsequent voucher or a copy of it

attached here in favor of Henry Cowell Lime & Cement Company for $2,362.56, and a note added to the face of the paper shows that the voucher was settled in the General Accounting Office for $2,100, but there is nothing
145 here to show what deduction was made.

Q. And the date of this case was 1935, was it?

A. The bids were opened October 14, 1935 and the additional settlement was made June 9, 1937.

Q. Do you have any case here in which the commercial freight was deducted notwithstanding that clause providing for the deduction of such rate and which was appealed to the General Accounting Office?

A. Yes, there should be in the file a couple of such cases. It may be among the other papers.

146 Examiner Norwood: The hearing will come to order.

By Mr. Wooden:

Q. Mr. Fry, will you take up another case where bids were handled by you for the Indian Service and give us the same information that you gave in the other cases?

Mr. Zimmerman: I wonder if the reporter would mind reading that question to us? We could hardly hear it.

(The question is read.)

A. Bids were opened in this case on December 26, 1934, for 250 barrels of Portland cement for emergency conservation work at Isleta, New Mexico, and Laguna, New Mexico. There were two lots, 250 barrels each lot. We received two quotations, one from the Southwestern Portland Cement Company of Los Angeles and the other from the Monolith Portland Cement Company of Los Angeles. On this later project the price bid by both was $2.73.95 per barrel.

Q. How was the award made? To whom?

A. We deducted the commercial freight rate—

Q. From what?

A. Rather we deducted the commercial freight rate per barrel from the barrel price at destination.

Q. From the Government destination price?

A. We deducted it from the Government destina-
147 tion price. What do you mean by "Government"? The price quoted or price we would make?

Q. No, the price quoted.

A. The price quoted. Yes, we deducted the commer-

cial freight per barrel from the price the bidders quoted per barrel at destination. That gave us the effect of having f. o. b. shipping point price. Then to that we added the actual land grant freight to Isleta and awarded it to the lowest bidder.

Q. Was there any bid filed on the basis of f. o. b. mill?

A. No.

Q. Was any requested?

A. From the survey of the papers here that were part of the bidding I would say there was not in this case.

Q. Did either of the bidders in that case make as part of their bid a similar clause about deducting this rate, whatever rate is the lowest?

A. Each of the bids has attached to it, according to the abstract here, a notation. Under the Monolith bid this statement is made: "If award is not made immediately we reserve the right to withdraw this quotation upon five days notice. The United States Government shall determine its cost f. o. b. cars Monolith, California, for invoicing purposes on shipments moving on Government's bill of lading to the above named destination only by subtracting from the above mentioned destination cost to
148 the United States Government the land grant rate as determined by the U. S. Government as being applicable from Monolith, California, to said destination, or the actual commercial freight rate, or a special United States Government rate applicable from Monolith, California, to destination named, whichever rate is the lowest."

Q. In deducting the commercial rate did you disregard that provision of the bid?

A. I did.

Q. Was any appeal taken from it?

A. Yes, sir, the files show a subsequent voucher for the net amount of $769.50, and the notation here says that the claim was settled for $384.75. There is attached here, that you just handed me, a photostatic copy of the action of the Comptroller General—or rather the General Accounting Office in which it states: "I certify there is due from the United States to the above-named claimant,"—this is addressed to the Monolith Portland Cement Company,—"payable from the appropriation indicated the sum of $384.75 on account of balance due as freight adjustment. The amount deducted on voucher No. 843 of the April, 1935, account of Lem A. Towers, Superintendent,

and S. D. A., Southern Pueblo's Indian Agency, in making payment for 500 barrels of cement furnished the Department of the Interior, Indian Service, Southern Pueblo Indian Agency on April 3, 1935, under contract No. I-99-149 Ind-Ecf-61, consisting of proposal dated March 18, 1935, and acceptance dated March 27, 1935 (Indian Claim No. 412190)."

Q. Now, Mr. Fry, I do not want to interrupt you if you are not quite through with what you read there, but does that mean that your deduction of the commercial rate from this Government destination bid was reversed by the Comptroller General's Office?

A. Not the Comptroller General's Office, but the General Accounting Office.

Q. The General Accounting Office?

A. In this case, yes.

Q. Was there another case in which you were sustained in that?

A. One of those cases that I handed you a little while ago.

Q. Will you identify which one it was?

A. I was just looking at it a moment ago. I could not identify it without seeing it.

Mr. Zimmerman: I think you have some papers here. I do not know whether that is what you are looking for.

The Witness: Right here it is (indicating). That was in the first case that we had only one bid.

By Mr. Wooden:

Q. Perhaps I was a little bit hasty in passing it over. I thought it was of no consequence. Will you state what case that was so as to identify it and then state what you did in deducting the commercial rate and the subsequent course of events? The date of this was what? Fix that first.

A. The bids were opened in this case on January 10, 1935, for Pima Agency, 160 barrels of cement. We received one proposal.

Q. Was that bought on a Government destination basis?

A. This bid was for delivery at Dock, Arizona.

Q. Was a Government destination price so specified?

A. The price at Dock was $458.97.

Q. Did this clause appear in the bid providing for the deduction of whichever rate was the lowest?

A. There is a notation on the abstract that may be—that may not be an exact reproduction of what is in the bid. I can not tell by this set-up. It states f. o. b. Dock, Arizona, and provides subtracting from this price Government land grant rate from Monolith, California, if shipment moves on Government bill of lading.

Q. Did you, notwithstanding that, deduct the commercial rate in that case?

A. We deducted the commercial rate of $209.76, leaving a difference of $249.21.

Q. Why did you deduct the Commercial rate rather
151 than the land grant rate as provided for in the bid?

A. Because it was apparent to those who did the work on this that that statement there is not clear. Now whatever the reason was I would not be able to explain now without checking up again back in the office.

Q. Was that case appealed?

A. Yes.

Q. What was the result?

A. I might finish that statement that I was making.

Q. All right.

A. To that difference you add the Government freight of $146, leaving an amount of $394.21 as the amount due the contractor. Now that case was appealed by the Monolith people and the difference that was asked for was disallowed under date of September 10, 1935.

Q. On what ground was it disallowed?

A. Well, there is a letter from the General Accounting Office here, or rather a photostatic copy. Shall I read it?

Q. Let me see it.

(The document was handed to Mr. Wooden.)

By Mr. Wooden:

Q. Did you get an opinion from the General Accounting Office on this case, or get advice on their rule?

A. Let me see it.

152 (The document was handed to the witness.)

Q. In other words, were you advised that the claim was disallowed by the General Accounting Office?

A. We are never advised of that. It comes indirectly if we get it, but there is in the file here a communication, a copy, rather, of a communication from the General Accounting Office which is the same, apparently, as this photostatic copy.

Q. You mean then that the General Accounting Office

furnished you with a copy of its decision as given to the Monolith Company?

A. No, I rather think that this was gotten from the accounting branch of the Indian Office, to which these statements were made and not to us.

Q. Furnished to them?

A. Furnished to the Department.

Q. And it came to your attention in that way?

A. Yes.

Q. Will you state the ground on which the General Accounting Office disallowed the claim?

Mr. Zimmerman: Does that ask for the reading of the letter?

The Witness: Yes.

By Mr. Wooden:

Q. Well, you can answer it any way you like.

153 A. Well, I would prefer to read the letter. This letter only came to us recently and I would rather read it than attempt to state it offhand.

Q. All right.

A. After the identifying paragraph it states: "The record shows that in response to an invitation to bid you submitted a proposal wherein you stipulated that 'the U. S. Government shall determine its cost f. o. b. cars Monolith, California, for invoicing purposes on shipments moving on Government's bills of lading to the above-named destination only by subtracting from the above-mentioned destination rates to the United States Government the land grant rate as determined by the U. S. Government as being applicable from Monolith, California, to said destination, or the actual commercial freight rate or special U. S. Government rate applicable from Monolith, California, to destination named, whichever rate is the lowest.'"

By the way, this letter was addressed to the Monolith Company by the Accounting Office.

"In connection with land grant deductions you are advised that the right thereto was acquired by the Government originally through supplying public lands for railroads to such an extent that construction of the particular railroads was made possible thereby, and this right is beyond surrender without specific statutory au-

154 thority.

"It follows that the insertion of the above quoted

stipulation in the contract is unauthorized and if accepted it would be depriving the Government of the advantage of any land grant rate and therefore bestow this advantage on you.

"It is clear that if shipments had not been made on the Government bill of lading you would have been obligated to pay the commercial freight rate from your shipping point, Monolith, California, to the destination, Dock, Arizona. Accordingly, as shipment was made at Government expense you were only entitled to payment at the price bid for the cement f. o. b. destination less the commercial freight rate thereon from your point of shipment. Inasmuch as payment was made on this basis it follows that your claim for an additional amount must be disallowed. I therefore certify that no balance is due you from the United States."

Q. Would you say that that represents substantially your position on the question of whether the commercial rates should be deducted from the Government destination price?

Mr. Clark: That is objected to as irrelevant and immaterial.

Mr. Zimmerman: Was the signature read?

Examiner Norwood: Objection overruled.

155 Mr. Zimmerman: May I ask whether the signature to the letter was read?

The Witness: This one?

Mr. Zimmerman: Yes.

The Witness: This is a copy. Yes, there is a signature there.

Mr. Zimmerman: Did you read that?

The Witness: Well, it is J. R. McCarl, Comptroller General of the United States, by—it looks like L—wait a minute. Let me check this typewritten sheet. L. A. White.

Mr. Wooden: The last question is pending, is it not?

The Witness: Yes. It does represent my own idea of the matter.

By Mr. Wooden:

Q. Will you explain just wherein the deduction of the commercial rate from the Government destination price is necessary in order to give the Government the benefit of the land grant rate?

A. Well, if we deducted the land grant rate under these clauses that have been put in the bids lately the difference

between the land grant rate and the commercial rate would stay in the amount we pay the contractor.

Q. You mean it would accrue then to the benefit of
156 the contractor.

A. Yes.

Q. And increase his net price that much, is that what you mean?

A. Increase the amount he would get.

Q. Yes.

A. If you call that the net price, yes.

Q. And you say that notwithstanding that the Government destination price as bid may not be built up upon the basis of the commercial rate?

A. The Government price or the bid price?

Q. The bid price.

A. The bid price?

Q. The Government destination price.

A. There is no way that we can find out what the price f. o. b. shipping point is—or let me put it the other way around. We can not tell whether the bidder has built his price up on the commercial rate or the land grant rate because there is no shipping point figure shown in the bids, so we assume, or did assume at that time, when I operated under that idea, of allowing them only the—or not allowing them the land grant—I assumed that they were building up on the commercial freight rate.

Q. And the accounting office sustained you in this particular case?

157 A. In this particular case, yes.

Q. Now, was there a case about the same time involving an important purchase of the Reclamation Bureau before the Comptroller General on the same question?

A. I could not say it was about the same time. I would not know the time. I mean, I would not be able to remember.

Q. Were you familiar with the Comptroller General's ruling in a case involving the purchase of 10,000 barrels for the Grand Coulee Dam?

A. I have read the decision.

Q. I show you what purports to be a photostatic copy of an original letter addressed to the Secretary of the Interior by Comptroller General McCarl, I suppose, and ask you if that is the decision which you say you read?

(The document was handed to the witness.)

A. Yes, sir.

Q. Do you know who, in the Interior Department, presented that case to the Comptroller General?

A. I do not know.

Q. Did you act upon the basis of that decision which you have before you there in the handling of bids thereafter?

A. This decision has the effect of deciding against the contractors, as far as deducting over the land grant is concerned.

158 Q. That is the same control clause that you previously discussed.

A. Yes. I acted under that, not because of this letter, but my action was independent of this.

Q. And prior to it?

A. I think prior to it, yes. I acted under that setup until the Comptroller reversed his decision.

Mr. Wooden: I ask to have these marked Commission's Exhibits 8-A, 8-B, and 8-C.

(The papers referred to were thereupon marked for identification "Commission's Exhibits 8-A, 8-B and 8-C.")

Mr. Little: What is the number of the decision?

The Witness: You mean the Comptroller's number?

Mr. Little: Yes.

The Witness: A60755.

By Mr. Wooden:

Q. Will you identify this, Mr. Fry, as a document or a photostat of an original document from the files of the Interior Department?

A. I can only identify it by recognition of the names on here. It did not come from me.

Q. I understand.

A. Yes, I do, from the Reclamation Service, transmitted by the Chief Clerk, Floyd E. Dotson.

159 Mr. Wooden: I would like to offer this decision of the Comptrolle. General for the record, Your Honor.

Mr. Clark: May I ask the purpose of the offer, if the Court please? It seems to me it is incompetent. What difference does it make in this case what the Comptroller General did?

Examiner Norwood: I think he is trying to throw light on this. Go ahead.

Mr. Wooden: Your Honor, it illuminates and explains the witness' testimony about the procedure in deducting

either the commercial or the land grant rate, and if one thing is done, as the witness says, the Government gets the benefit of the rate and if the other thing is done the contractor gets the benefit. Here is the decision of the Comptroller General explaining the latter proposition.

Mr. Clark: You are wrong on that basis, because there is no charge in the complaint in reference to that.

Examiner Norwood: Counsel must remember that the charges are very broad and various effects are charged.

Mr. Wooden: Your Honor, I would like to disagree with counsel in his statement that it is not charged in the complaint. I think there is a direct charge to the effect
160 that the Government is deprived of the benefit of the land grant rate.

Examiner Norwood: Yes. He is connecting this up, I think, and I could not draw a fine line of relevancy on this story until it unfolds a little. If I find that there is some irrelevant testimony there it will be either disregarded or it will be struck on a later motion.

Mr. Little: I could not get Your Honor's ruling. What the Comptroller General's ruling might have been would have no bearing on the question of whether there is a conspiracy.

Examiner Norwood: It might bear on some effects here, or bear on this rate that they have made wherein a certain discount is allowed for the land grant shipments?

Mr. Wooden: It affects the actual delivered price paid by the Government very directly. Furthermore, as will later appear, this so-called control clause has been used by many of the respondent companies, the same control clause, in substance, having the same effect as discussed in the ruling of the Comptroller General.

Mr. Zimmerman: And sometimes by the Government in its specifications too.

Mr. Wooden: We will come to that.

161 Examiner Norwood: I think it should go in. I will give counsel permission to connect up his testimony. Objection overruled. The exhibits are received as Commission's Exhibits 8-A, 8-B and 8-C.

Mr. Wooden: Your Honor, I would like to read this. It is dated March 23, 1935.

Examiner Norwood: If it is an exhibit is it necessary to read it?

Mr. Wooden: It does not need to be taken for the record,

but I want to read it for your information, and some parts of it, as a matter of fact, I would like to have on the record.

Examiner Norwood: Can not you just read excerpts of it?

Mr. Wooden: All right, I will try to do that. It is an important document.

"The Honorable,

"The Secretary of the Interior.

"Sir:

"There has been received your letter of March 8, 1935, as follows:

162 " 'Bids were opened at the Denver office of the Bureau of Reclamation February 21, 1935, under Invitation No. 38067-B-1, for 10,000 barrels of cement for the Grand Coulee Dam, Columbia Basin project, Washington, and 11 proposals were received. Enclosed is a copy of the invitation and an abstract of the bids received, from which it will be noted that the delivered price submitted by all bidders is exactly the same or $3.17 per barrel. Also each bid contains the following stipulation:

" 'The U. S. Government shall determine its cost f. o. b. cars, Portland, Oregon (the shipping point is different in each bid) for invoicing purposes on shipments moving on U. S. Government bills of lading to the above named destination only, by subtracting from the above mentioned destination cost to the U. S. Government the land grand rate as determined by the U. S. Government as being applicable from Portland, Oregon, to said destination or the actual commercial freight rate or special U. S. Government rate, applicable from Portland, Oregon, to destination, which ever is the lowest.' "

I would like to ask the witness just a question interpolating there.

By Mr. Wooden:

Q. Which is the lowest as between the commercial
163 rate and the special U. S. Government rate and the land grant rate?

A. You would have to know what the special rates were in a particular case before you could answer that. You know the Reclamation Service for years was given, by the railroads, the alternative of 50 per cent of the tariff rate as a special rate to them. I believe that has been with-

drawn in lots of cases, but there are special rates quoted by the rules, especially on big shipments. Now ordinarily that special rate would be lower than the land grant rate, and the land grant rate is lower than the commercial rate, has to be in every instance.

Q. So, as a matter of fact, under that clause you do not have any option of deducting the commercial rate at all if you follow that clause?

A. Will you say that again?

Q. Under that clause that I just read you would not have any option of deducting the commercial rate, because either the special or land grant rate would always be lower?

A. If there were no special rates and no land grant then the commercial rate might be deducted under those conditions. That would be the only condition where there was no land grant or special rate.

Mr. Wooden: Continuing the quotation from the Interior Department letter:

"'As you, of course, know, where land grant
164 rates are available the practice is to deduct the commercial freight rate and ship on a Government bill of lading. In my view the stipulation quoted above, if accepted, would deprive the Government of the advantage of the land grant or special Government rate and would bestow this advantage upon the contractor. Your decision is requested as to whether funds available for this project may properly be charged under a contract containing the stipulation quoted.'"

That closes the quotes of the letter from the Interior Department. Taking up now the comments of the Comptroller General:

"There was before this office in decision of December 11, 1933, A-51591, a somewhat similar condition with respect to an attempt of certain members of the steel industry to contract with the United States for the delivery of steel f. o. b. Government destination, and if the Government had acquiesced in such procedure it would have operated to deprive the United States of land-grant deductions. The following is quoted from said decision:"

I will pass up the quotation.

Continuing with the Comptroller General's opinion in this present case:

"A copy of that decision was transmitted to the
165 Administrator, National Recovery Administration, for his information, and in letter of December 12,

1933, he repeated that he concurred with the conclusion reached in said decision to the effect there was no legal basis in either the National Industry Recovery Act of June 16, 1933, 48 Stat. 195, et seq., or the approved code of fair competition for the steel industry for depriving the United States of the benefits which it had long since acquired under the land-grant law. The same conclusion is required here; and in addition to the fact that neither in the act of June 16, 1933, nor in the code of fair competition for the cement industry is there any authority to deprive the United States of the benefit of land-grant deduction in the transportation of its proper, there is a question of whether these bids may not be in violation of that part of Section 3 of the act of June 16, 1933, which provided that codes of fair competition 'shall not permit monopolies or monopolistic practices.' That question would appear to be for the attention of the Federal Trade Commission or the Department of Justice.

"Answering specifically the question presented, I have to advise that the funds available for this project may not properly be charged under a contract containing the stipulation quoted in your letter."

166. Mr. Zimmerman: May I ask a question?

Examiner Norwood: Yes.

Mr. Zimmerman: Mr. Wooden, do I understand that you are attempting to prove that the Comptroller General had changed or reversed his opinion?

Mr. Wooden: That will appear later. That is not yet.

Mr. Zimmerman: Not yet.

By Mr. Wooden:

Q. Now do I understand, Mr. Fry, that for a time you continued to deduct the commercial rates from the Government destination bids on the strength of the Comptroller General's ruling that I just read?

A. Yes.

Q. How long did that continue?

167 A. As I recall until we got word of these later decisions wherein he reversed his position in January and February 1937.

Q. Do you have the book of the published decisions there?

A. Yes.

Q. Do you have the decision known as A-83059?

A. Yes, sir, right in front of me.

Q. And do you also have a decision known as A-83392?

A. That is the February decision?

Q. That is the subsequent decision, very shortly afterwards. Yes, February, that is right.

A. It is in this book.

Q. Are those the decisions which you referred to as reversing the previous ruling of the Comptroller General?

A. Yes, sir.

Q. Do those subsequent decisions contain any reference to the preceding decision that I read?

A. I think not.

Q. Do I understand that since these February and January 1937 decisions of the Comptroller General that you no longer deduct the commercial rate from the government destination price that is bid by a cement producer?

A. I would not say that.

Q. I did not get your answer.

A. I say, I would not say that in every case.

168 Q. Do you consider the Comptroller General's rulings on this subject mandatory?

A. Yes.

Q. Or permissive?

A. Mandatory.

Q. Even though they are put in permissive terms?

A. Well, it is a matter of construction.

Q. Yes, and you construe them as mandatory?

A. Yes.

Q. Well, then, what you mean to say is that in some cases you follow the recent opinions and in the other cases you do not?

A. Pardon me?

Q. Do you mean in some cases you have followed the recent opinions and in other cases you have not?

A. No, not intentionally. It seems to me I saw in one of these cases deductions.

Q. Of the commercial rate?

A. Yes.

Q. Can you locate it?

A. I do not know. I have only the recent cases. I do not know where all the cases are now.

170 Washington, D. C.,
Thursday, December 2, 1937.

171 W. B. FRY resumed the witness stand and, having been previously duly sworn, testified further as follows:

Direction Examination by Mr. Wooden (Continued).

Q. Mr. Fry, yesterday afternoon you appeared to be somewhat uncertain of the present practice of your department with regard to the deduction of the commercial rate from the Government destination price. Are you any more certain this morning than you were yesterday?

172 A. I was not so uncertain yesterday about what it ought to be but I seemed to remember a case where someone had departed from that practice and I did not want to make a definite statement. I am prepared this morning to say our definite practice now is to follow the Comptroller's rulings and to deduct only from the destination price where we have to ship on the Government bill of lading the Government land grant rate.

Q. And do I understand that that is the present practice notwithstanding your opinion as stated yesterday that to do that it operates to deprive the Government of the benefit of applying the land grant rate?

A. Yes, because of the Comptroller's decision.

Q. What is, so far as you know, the origin and history of this so-called control clause which so operates, the control clause as inserted in the bid—first, how long have you known about it?

A. Some sort of a control clause started, according to my recollection of the matter, when the cement industry established a code.

Q. And before that time, to you knowledge, was anything in the nature of a control clause likewise used in the bids to your department?

A. I can not recall that it was.

Q. And the control clause is still being used?

A. You mean the control clause is what the bidders put in?

173 Q. Yes.

A. Yes.

Q. That is being used and now accepted by the department as the basis for awarding the bids?

A. There is a clause put in the bids. Whether it is exactly the same as the one that started it I am not prepared to say, but it amounts to the same thing.

Q. That is what I was going to ask. It provides, does it not, for the deduction of whichever rate is the lowest?

A. Yes.

Q. And as you said yesterday that means that the commercial rate is never the lowest, is that right?

A. That is correct.

Q. Suppose in a case where this control clause were used and the Government destination price quoted, with identical bids on the delivered basis, you award the contract by lot and the lot happens to fall to the nearest mill to the destination, what would be the result?

A. That is a hypothetical case?

Q. Yes.

A. The result would be that the cement company receiving the award as compared with the others would pay less freight and probably gain in the amount they charge for the cement.

Q. Suppose a case where the bid were awarded by lot and the lot fell to the most distant mill, what would 174 be the result?

A. The reverse.

Q. Suppose in such a case the award by lot fell to a mill intermediate between the most distant and the nearest?

A. Well, it does not always follow that the distance in mileage gives you the highest commercial rate. That is generally the accepted rule, but it does not always follow.

Q. Do you purchasing officials know in advance of the settlement by the accounting office of an award what the exact land grant rate is on a particular shipment?

A. No. You mean the settlement by the General Accounting Office?

Q. Yes.

A. No, we do not.

Q. What is the general status of land grant rates with reference to their being generally known?

A. Well, from inquiries we get and information from time to time there is comparatively little known except

in those places where they have built up Government rate experts; in other words, they have some one who has studied the land grant problem and is able to work it out.

Q. Who is someone?

A. Who is?

Q. Yes.

A. I am talking about any outside organization
175 other than the Government.

Q. Do the railroads themselves always know what the land grant rate is in advance?

Mr. Leisure: Now, if the Court please, it does not seem to me that the Government witness here is in a position to testify to what the railroads know. It would be proper to call the people on the railroad. This is one of the issues in the case or I would not object. It seems to me it is too important not to object.

Examiner Norwood: It seems to me it affects his experience in communications with the railroads. If he knows it he can bring out any matters that are competent to show that, other railroad statements, railroad letters, or anything like that.

Mr. Wooden: Let me ask another question.

By Mr. Wooden:

Q. Do you have contacts with railroads and railroad officials in connection with land grant rates?

A. We have a traffic branch in my own organization. They are in communication over land grant matters, because there are differences of opinion on them, but in the final analysis the General Accounting Office settles those questions.

Q. Does your branch that operates under your jurisdiction, in dealing with the railroads on land grant mat-
176 ters, find that the railroads themselves do not always know in advance what the land grant rate is?

A. May I ask what you mean by "in advance"?

Q. Before the railroad's transportation bill is submitted for payment.

A. Well, there are regularly established formulas for working out land grant deductions between given points and they would know from their side as the Government knows from its side what they are.

Q. Do you find sometimes differences of opinion?

A. Yes, sir.

Q. That results in a different settlement than what was originally thought to be the case with the railroads?

A. Yes, sir.

Q. Well, whenever you do deduct a land grant rate for the purpose of determining which bidder should have the award how certain are you that that is the basis on which the settlement will be made with the railroad?

A. We are never positively certain. Therefore, when we make a deduction that is set up, a proposed deduction, we generally hold back a little bit more as a measure of safety, so if the Accounting Office raises our fee we have the money held up.

Q. Are you familiar with the decision of the Comptroller General on that general subject, No. A-86146?

177 A. I would not know it by that number. I probably have read it.

Q. I show you a printed pamphlet containing it and ask you if you are familiar with it? (Handing document to the witness.)

A. I am acquainted with the principle involved in that case.

Q. Would you say that the principle there enunciated is substantially what you have just given expression to as to the difficulty of ascertaining the land grant rates in advance of settlement?

A. I would. Our practice has been never to set up a positive land grant deduction to be held indefinitely but to figure them as they come along.

Mr. Wooden: For the further clarification of the record, this decision of the Comptroller General, A-86146, is dated July 1, 1937.

By Mr. Wooden:

Q. Do you know, Mr. Fry, whether or not this opinion that I have just referred to is in a printed volume of the Comptroller General's decisions?

A. It is a fact that these little pamphlets make up the final printed volume. These are issued monthly, usually about two months after they are gotten together, after the decisions—I mean after the months, rather, for which

178 they apply, and ultimately they are put in a bound volume like this bound Volume 16. This is 17 and not as yet in the bound volume.

Q. While you are on that point, will you give the reference in the bound volume 16 to the two opinions that were referred to yesterday by number?

A. It would be the same numbers as in those pamphlets.

Q. Give the volume and page number, where they may be found.

A. Yes, sir. The January decision numbered A-83392 is on page 729 of Volume 16 of the Comptroller General's decisions. The decision of January 28, No. A-83059, is on page 697 of Volume 16 of the Comptroller General's decisions.

Q. Thank you. Referring to the Comptroller General's opinion A-83059, does it appear there that the question presented made reference to a former holding of the Comptroller General that in the case of the Lone Star Cement Company was disallowed a certain amount because otherwise it would have benefited by the land grant deduction to which the Government was entitled?

A. He makes reference in the first sentence of his opinion to 10 Comptroller General, 402.

Q. I am referring to the quotation.

A. That is a letter.

179 Q. From the Secretary of Agriculture.

A. Oh, yes. A hasty review does not show any reference to the Comptroller General's decision but does to a settlement of the General Accounting Office in the Lone Star case.

Q. That is what I refer to.

A. May I say there is a distinction there. The accounts that come in, vouchers and disbursing officers' accounts that come into the Government are first acted upon generally by the General Accounting Office which, while it is a branch of the Comptroller General's Office, works in the first instance somewhat independently of the Comptroller General. The Comptroller General takes up cases on appeal, and there should be a distinction between the General Accounting Office and the Comptroller General.

Q. I want to amend my question to make it apply to the General Accounting Office.

A. All right. Well, he referred to General Accounting Office Settlement No. 0428423 in account of Major E. C. Morton, Finance Department, U. S. Army, under date of December 3, 1936. Shall I read the rest?

Q. Go ahead.

A. "By reason of which the Lone Star Cement Corporation suffered a disallowance of $88.83 under apparently similar circumstances, for the reason that otherwise it would have benefited by land grant deduction
180 to which the Government was entitled." That is the end of the reference.

Q. Does the opinion of the Comptroller General, that contains that quotation, make any reference to a former ruling of the Comptroller General that this so-called control clause did operate to deprive the Government of the benefit of the land grant rate?

A. May I read it?

Q. No, you just answer the question.

A. Following what was stated above?

Mr. Leisure: The record is there, Your Honor. Rather than have the conclusions of this witness I would like to have it read.

Mr. Wooden: I have no objection.

Mr. Leisure: Since the witness has read part of this I would like for him also to read, for the benefit of Your Honor and the record, the last two paragraphs on the same page.

Mr. Wooden: I have no objection.

Examiner Norwood: Go ahead and read it.

The Witness: I will continue then.

Mr. Leisure: The last two paragraphs on page 698.

The Witness: Just the last two paragraphs?

Mr. Leisure: You can read the whole thing if you want to.

Examiner Norwood: I wonder if this could not be
181 incorporated in the record by reference?

Mr. Wooden: I was hoping to do it.

Mr. Leisure: That is all right.

The Witness: Shall I read it?

Examiner Norwood: Go ahead and read it.

A. "The decisions of this office have been to the effect that cost of delivery is always a matter for consideration by the Government in determining which is in fact the lowest bid received. 10 Comptroller General 402. And in order that this may be accomplished the advertisement for bid should provide for submission of bids f. o. b. Government's destination and f. o. b. point of business location, factory or otherwise."

By Mr. Wooden:

Q. Pardon me right there. The "factory or otherwise", do you see any difference between simply saying "submission of bids f. o. b. Government destination or otherwise", and "factory or otherwise"?

Mr. Leisure: Now the document speaks for itself. I do not think we need any interpolation in this witness' testimony at this time.

Mr. Wooden: The witness deals with these things all the time and has to interpret them for his guidance.

Examiner Norwood: I think the witness can tell what he did pursuant to those rules or rulings.

182 Mr. Leisure: The Government is offering the opinion and then is also trying to show that there is something wrong with the opinion, when they are vouching for it, when they are offering it.

Mr. Wooden: We are just simply seeking to show the facts, that is all.

Examiner Norwood: Is there a question pending now?

(The question was read.)

Examiner Norwood: He asked him whether it is what is stated on that page. I see no harm in his saying whether it is or it is not. Objection overruled.

A. I would say that if we should put in what you suggested, f. o. b. Government's destination point or otherwise, that the bidders would have the same right, but as a matter of suggestion to the bidders, or information, we generally specify f. o. b. factory or f. o. b. bidder shipping point, in fact the idea being, except for the fact that we want a destination price, they can offer the stuff anywhere else in the United States. We do not care about that.

By Mr. Wooden:

Q. All right, go ahead with the reading.

A. (Continuing.) "—factory or otherwise, so that the Government having regard for land grant or other
183 advantages available in such connection may accept that bid which will result in the lowest net available charge against public moneys."

Q. Let me interrupt again. Does the acceptance of this control clause permit you to accept the bid which will result in that lowest net available charge against public moneys?

Mr. Leisure: Against what? I did not hear that.

Mr. Wooden: Against public moneys.

Mr. Leisure: If you just read on, the decision answers that very question. Being offered by the Government it should be the answer.

Mr. Wooden: I do not think it answers it.

Mr. Leisure: It may not answer it satisfactory to the counsel for the Government.

Examiner Norwood: Well, on cross-examination you can have him read that.

The Witness: Shall I answer?

Examiner Norwood: Read the question, Mr. Reporter.

(The question was read.)

A. We can only be guided by the bids we receive, and where they are identical, under such a bidding we have no way of determining—in other words, I would say that it does give us the lowest bid if there is such a bid.

184 By Mr. Wooden:

Q. Under the circumstances?

A. Under the circumstances, yes, but not actually.

Q. In other words, it is the lowest available?

A. Lowest available bid, yes.

Q. Go ahead with the reading.

A. (Continuing.) "It appears in this case bids were requested as required by the decision in this office, and in submitting their bids each of the bidders quoted a price with the understanding that the cement should be shipped on Government's bill of lading and that the amount of freight incurred by the Government should be deducted therefrom. There would appear, however, no objection to the submission and consideration of bids on such a basis.

"Answering your question specifically, you are advised that the only bid that may be accepted in this instance is the one which would result in the lowest net charge against public moneys, considering the cost to the Government of effecting the delivery."

Q. Do I understand, Mr. Fry, that you consider the Comptroller General's statement that there was no objection to it as being mandatory upon your department, but you do it nevertheless?

A. Yes, sir.

Q. Do you know what the practice is in other Gov-

185 ernment departments?

A. Not with certainty, no.

Q. Did your department, in specifications or invitations for bidding on cement, formerly give notice that the commercial freight would be deducted from any destination price?

186 A. I think we did carry such a provision. I would have to check up to be sure about it, though.

Q. Do your specifications and the invitations to bid now contain such a notice?

A. Unless by inadvertence they should not, that no such clause should be in the advertisement. May I amend that statement by saying that a number of these advertisements are made by field officers and they do not always follow the last rule laid down.

Q. Does your department still ask bidders on cement to submit bids on an f. o. b. mill basis?

A. Yes. You mean the point of shipment?

Q. Yes.

A. Not necessarily mill.

Q. The point of shipment?

A. Yes, sir.

Q. Do you recall any recent instances where you were successful in getting bids f. o. b. point of shipment?

A. Not recently. Nothing has been brought to my notice.

Q. Would you say that unless the Government does get bids on an f. o. b. point of shipment basis, can it or can it not get the benefit of the land grant rates?

Mr. Leisure: If Your Honor please, I do not see how this witness is prepared to answer that question. It is a question of argument. He can argue with counsel

187 about that, but I do not think it is competent.

Examiner Norwood: It seems to me that in making his purchases in a certain way or finds that he can, or that he can with difficulty, or that he can not—I believe he can tell that.

Mr. Leisure: That he has done.

Mr. Wooden: I believe it is competent.

Examiner Norwood: Make it factual and not opinion testimony.

Mr. Wooden: I insist that a witness such as this is entitled to express his opinion on matters that he is dealing with for over a long period of time and if he gets them in his every day work. He is in the category of an expert witness on the subject, I would say, Your Honor.

Examiner Norwood: Well, counsel may be right about that, but I think it would be more satisfactory all around if he would base it on his experience and what he has found from these particular purchasers that come up before him. Respondents' counsel would be happier if you would do that.

By Mr. Wooden:

Q. Has your department had a policy at any time in the case of tie bids of awarding the contract to the most distant bidder?

188 A. Yes.

Q. Will you state under what circumstances that policy was adopted?

Mr. Zimmerman: May I interrupt just a moment? It is very difficult in this room to hear distinctly. You are speaking so close to the witness, and I would appreciate very much, and I am sure that we all would, if you will try to make your questions a little louder.

Examiner Norwood: Please speak a little louder to the witness. Repeat the question, Mr. Reporter.

(The question is read.)

A. The policy was adopted by Secretary Ickes because of the continuation of identical bids. I did not get in on the case in point, so I can not tell you just exactly what case it was established, but it was established by direct order of Secretary Ickes to me.

By Mr. Wooden:

Q. Has it been applied to purchasers of cement?

A. It has.

Q. Do you know whether or not that has continued to be the policy of the department?

A. It has.

Q. So far as any cases coming under your observation?

A. That is all I can speak for, yes.

Q. Now, you have, as I understand it, been general

189 purchasing agent for a lot of commodities aside from cement?

A. Yes.

Q. Have you found in the submission of bids on some other commodities that you do not have this tie bidding?

Mr. Leisure: I object to that question, if Your Honor please, as being incompetent, immaterial and irrelevant and not within the issues of the complaint. What others

did certainly has nothing to do with the charge of conspiracy in this case.

Examiner Norwood: Objection overruled. Answer the question.

A. Yes.

By Mr. Wooden:

Q. Will you name some of them?

A. That do not have the tie bidding?

Q. Yes.

A. Well, take the whole class of textiles—please understand that there are times when two bidders quote the same price. That comes up through a different set of conditions, I imagine; but, speaking generally, the textile industry, furniture, kitchen ware, engines, pumps—I could go through probably a thousand items or more.

Q. Most of those you name are specialties though, are they not, rather than standardized products?

A. Well, it depends on how far you go in calling 190 an article standardized. Piece goods are standardized to a certain extent, and yet there is a difference in them.

Q. Do you mean textiles?

A. Textiles. Each company that puts out, for instance, a mixing machine or a vegetable paring machine, they are all in the same general class, but they are made differently.

Q. Are you able to obtain f. o. b. shipping point prices of other commodities than cement?

Mr. Leisure: The same objection, if Your Honor please.

Examiner Norwood: Objection overruled.

A. Oh, yes.

By Mr. Wooden:

Q. Name some of them.

A. The points or the articles?

Q. The articles.

A. The same classes as I just named to you. A number of bids come in from factories naming the factory price. Others name centralized points where they have a stock or warehouse. Still others name the points that we may suggest as a permissive delivery point or points. There is no limitation to the points we get on general merchandise.

Q. As I understand it, your functions and duties as a

purchasing officer under Section 3709 require you to take advantage of competitive bidding?

191 A. It does not mention the word "competitive." It says we must advertise for bids; the underlying principle being that competition will be gained thereby.

Q. Do you consider that your functions and duties under that statute can be carried out with identical bidding on delivered prices?

A. Not to the best interests of the Government, but we have no other way of handling the case if bids come in that way.

Q. And I suppose you have to have the goods?

A. We might reject the bids in the first instance and get the same situation in the second and third and fourth.

Q. Does that answer of yours a moment ago mean that in your judgment and experience these tie bids on cement are competitive or not competitive?

Mr. Leisure: Now, if Your Honor please, the facts speak for themselves, and if this witness could answer that question, we would not need to try the case; we would just call him here and ask him for his conclusion on the case and we could all go home. I object to the question as incompetent, immaterial and irrelevant.

Mr. Wooden: May I say a word?

Examiner Norwood: Yes.

Mr. Wooden: The witness answered the previous question without any objection. I then called on him to amplify and explain his preceding answer. It is surely

192 competent—

Mr. Leisure (interrupting): Read the question.

Mr. Wooden: Just a moment. Aside from that, I again assert that this witness is in the category of an expert witness on the subject of competitive bidding. He is not a theorist, he is a practical man, dealing with these matters over years and years; he has already testified that he does not find the same situation in the other commodities that he buys for the Government, and therefore I submit the question is proper.

Mr. Leisure: I add then, Your Honor, to my previous objection, that the witness has not been qualified as an economic expert, and is therefore not qualified to give opinion evidence on the question asked.

Mr. Wooden: There are other kinds of experts than economic ones.

Examiner Norwood: Read the question.

(The question is read.)

Examiner Norwood: The Supreme Court decided in the International Shoe case that competition was a factual matter, and with regard to the purchases he made, I believe he may say whether or not he finds there the increase in competition or the absence of it. I will overrule the objection and counsel may have an exception. Answer
193 the question. Answer that question with regard to your particular dealings in making these purchases and not as a general proposition.

The Witness: Will you read the question?

(The question is read.)

A. I would say that I do not consider that competitive bidding on our requirements.

Mr. Wooden: You may take the witness.

Cross-Examination by Mr. Leisure.

Q. Mr. Fry, as to these bids which you testified concerning yesterday, is there any way you can tell when you get a bid whether or not it includes a land grant freight rate? I mean, so that you know what freight rate the bid is figured upon?

A. You mean f. o. b. destination prices that are offered us, if we know whether the land grant is—

Q. (Interrupting) When you get a bid, whether you can tell what rate has been used? I of course do not know how the Government regards these things, and I am not asking you critically; I am just asking you for information.

A. There is no way that we can tell what rate is used in making the laid down price, unless we would know the shipping point, and then we could only tell what rate ought to be used, but whether it was used or not as a freight rate, we could not tell.

194 Q. But as you state it today, you say you always deduct the commercial rate, is that correct?

A. If we have anything to go on. I mean if we are privileged to work it out that way, we would deduct the commercial freight rate that should apply.

Q. Now, if you had a bid that came in in round numbers of, say, just any number you want to use, say $4,000, you would figure it back to find out what the cost per barrel was? You would not accept it on a carload lot? The

Government would figure it back, would they not, per barrel?

A. Yes, figure it down to a barrel basis to get the comparative position.

Q. Precisely. Now, if you figured it down that way and it came out to four or five or six decimal points, wouldn't you then know that the land grant rate had been used?

A. We might suspect it, but I would not say that we would know it.

Q. Can you give me any instance where it would come out with decimals of that kind where the land grant rate was not used?

A. Oh, I could not tell you, giving you an instance, no, because I don't know what methods are used by the cement people in figuring up their prices. It may bring a decimal out. I would not say not, but ordinarily if it goes out to a great many decimal points, it would indicate that some such thing as land grant rates has been used in figuring.

195 Q. On some of these cases where round numbers were used that I saw yesterday, you yourself figured them out. I believe in one case you figured it out to the eighth decimal point, is that correct?

A. That indicates the abstract.

Examiner Norwood: We will take a ten-minute recess at this point.

(Whereupon a ten-minute recess was taken, after which the hearing was resumed.)

By Mr. Leisure:

Q. Mr. Fry, it was just called to my attention at the recess that in some of these bids it sometimes is apparent that the land grant rate is used; isn't that so? Will you just refer to that for the benefit of the reporter, and then tell His Honor whether or not it is apparent on the face of that bid that the land grant rate is used?

A. Used by the bidder?

Q. Just read at the bottom of the page there.

A. The notation, you mean?

Q. Yes.

A. (Reading) "The destination cost—"

Q. (Interrupting) I do not mean to read it in the record, but whether or not in some cases it is apparent

from the bid that the land grant rate is used, is the point I am making.

196 A. Yes, this is a statement to the effect that the destination cost to the Government at Gallup as shown in the bid is based on the use of the land grant rates from Humboldt, Kansas, to Gallup.

Q. That answers the question; thank you. Now, when this land grant rate is used and is added to the mill cost, that gives the Government the benefit of the land grant rate, isn't that so?

A. It certainly gives us the benefit of the land grant rate, yes.

Q. So that when you in addition thereto, deduct as you testified yesterday, deduct the commercial rate and again add the land grant rate, the Government is being paid twice on it, is it not?

A. They would be, yes, if we did that.

Q. That has been done, has it not?

A. If that is what we have done, that is done, yes.

Q. As a matter of fact, some of the companies have complained to the Government about that in the past too, haven't they, Mr. Fry?

A. I have not heard of that myself.

Q. Well, let me then read you from a letter in some of these exhibits you were reading from yesterday, a letter from the Monolith Portland Cement Company of Los Angeles, dated July 9, 1935, and see if this refreshes

197 your recollection, if you know about it:

"When the original price was quoted to you"—that is to the Government—"it contemplated the use of land grant rates, and the price quoted was a destination price based on a land grant rate, thereby giving you the advantage of the aforementioned land grant rates, and when you deducted the full commercial rate without giving us the benefit of differences between the amount you actually paid and the commercial rate, you in effect took the land grant saving a second time."

So there have been actual complaints made?

A. That is in the record, yes. I do not recall it, but if that is in the record, it is true, yes.

Q. Now, on these f.o.b. mill prices which were mentioned yesterday, the land grant rate is only arrived at by Government bill of lading at the point of shipment,

that is, title passes in these land grant rate cases at the point of shipment, is that right?

A. Where the price quoted us is f.o.b. shipping point—

Q. (Interrupting) That is right.

A. The title passes there.

Q. To the Government?

A. Unless there is some other provision that picks it up again at the end, as we do in some kinds of cases.

Q. That is what f.o.b. means, isn't it, Mr. Fry?

198 A. That is what we construe it to mean, anyway.

Q. Precisely. When you said a moment ago "Nothing recently", you did not want His Honor to understand that there has been any change since the filing of this complaint, as far as f.o.b. prices or during the period of the charge of conspiracy; you did not mean anything like that by the term "recently"?

A. No, that was not in my mind.

Q. Now I would like to have the reporter, if it is not too much trouble, just to run back to some of those industries that Mr. Wooden brought out a moment ago; those that did not submit tie bids to the Government, if you can find that readily.

(The following answer is read by the reporter:)

"A. Well, take the whole class of textiles—please understand that there are times when two bidders quote the same price. That comes up through a different set of conditions, I imagine; but, speaking generally, the textile industry, furniture, kitchen ware, engines, pumps—I could go through probably a thousand items or more.")

By Mr. Leisure:

Q. Now, in that answer you are only testifying from memory, and you may be mistaken about some of those?

A. Yes, I might, and I also said that there were

199 times when they did put in tie bids but it seemed to be not in the same classification as the cement, steel, and those companies.

Q. I do not know whether you are familiar or not with Secretary Ickes' testimony before the Senate Committee in which he named as representative of other industries submitting tie bids, kitchen equipment, pumps, valves, typewriters, steel lockers, school desks, school chairs, auditorium seats, table chairs—there is a list of about 50 or 75 there.

A. No, I am not familiar with that testimony.

Q. Well, he so testified before the Senate committee. If Mr. Ickes gave that testimony, would you think perhaps it was correct in regard to pumps and kitchen equipment?

A. Sure, I think he knew of cases where that had occurred.

Q. Now, none of the instances that you gave where they did not bid on stanadard products were heavy products such as cement? I notice you used textiles. They did not include cases where freight was a very important part of the destination price in the ones you gave?

A. I would say not.

Q. Now, most of the bids that you have testified to, Mr. Fry, came at a period during the existence of the N. R. A., did they not? Or let me put it this way, that many of the bids that you have testified to occurred during the existence of the N. R. A.?

200 A. You mean the cement bids now?

Q. Yes.

A. That is right. I would say so. It is my recollection that that is when the trouble that we have had began.

Q. Now, the cement code or the code provided during the existence of the N. R. A. that there should be open prices, did it not? There was a ten-day notice to be posted, isn't that so?

A. I would not be sure about that; I could not say.

Q. There were open prices. You do know? That is one of the things the code stood for?

A. Yes.

Q. So that when there were open prices, was it or was it not inevitable that the prices would be identical when any one bid trying to meet the lowest bidder to the Government?

A. I could see where that might be so, yes.

Q. Well, if you were a man going to sell, if you were a producer instead of in the Government service, don't you think that would probablly be so?

A. I think it would.

Q. Now, you were asked a hypothetical case this morning about the similar prices at the mill. Suppose you had a case where the prices were dissimilar at the mill, and when you started figuring out the cost of the articles, you

would figure out the cost to the Government, would you not?

201 A. You mean laid down cost?

Q. Yes. What it cost you.

A. Yes.

Q. That is, you would want to know the cheapest destination price, and the Government would use that destination price in order to determine the cheapest price?

A. Yes.

Q. You realize in this action that we are being criticised for using destination prices to other customers, aren't you?

A. Other than the Government?

Q. The Government is one customer that wants destination prices. That is the way they figure it, isn't it?

A. Yes.

Q. Let me ask you another question.

Examiner Norwood: Do not these bids ask for an f.o.b. mill price, all of your requests for bids?

The Witness: The Comptroller requires us to ask for bids both ways.

By Mr. Leisure:

Q. And in figuring it under the statute, you figure it at the destination price when it is cheaper to you, don't you?

A. Yes, because in that way we follow the Comptroller's direction in utilizing the land grant factor.

Q. Quite right. Now, when you follow it in that way, it might develop that the destination price which was

202 cheapest would be the highest mill net price? For instance, if the mill was nearer to the point of destination, it might develop that the destination price which you figured would be the highest mill net price?

A. We include the highest mill price, yes.

Q. In other words, the mill that quoted the highest net price might be the one that you accepted?

A. The lowest destination price counting the land grant rate.

Q. But the Government would figure it that the price to the Government probably, under the statute, as being the cheapest price?

A. The ultimate cost to the Government at the point of use or consumption.

Q. So that regardless of what other departments of the

Government might contend that price means, your department figures price as being destination price?

A. Yes.

Mr. Wooden: I have not raised any objection hitherto to the rather broad basis of questioning, but it seems to me at this time the questions are wholly premature and beyond the scope of proper cross-examination, because I went into no such thing with the witness on direct, and therefore I object.

Mr. Leisure: The entire matter was covered on
203 direct examination. I am not asking a single question that I did not take a note on as to what was being asked during the direct. I am merely bringing out how he figured it.

Examiner Norwood: I think he is within the bounds of legitimate cross-examination.

Mr. Wooden: I did not ask him anything about what he considered the price.

Mr. Leisure: You asked him how he figured them.

Examiner Norwood: Yes.

Mr. Wooden: How he figured the bids.

Mr. Leisure: And the witness is an expert.

Examiner Norwood: Objection overruled. Read the last question and answer, Mr. Reporter.

(The record is read.)

By Mr. Leisure:

Q. And you are operating under a statute that tells you to pick out the lowest bidder and the lowest price and accept that?

A. Yes.

Q. And your construction of that statute and the operating in your department is the price that is cheapest to the purchaser, in other words, destination price?

A. Yes, because after all that is the cost to the Government.

204 Q. Precisely; as it is to every purchaser. Now, in regard to arriving at these land grant rate allowances, until Mr. McCarl or someone else in the General Accounting Office has passed on them, the railroads use whatever the rate is known to be in their community? I mean, they submit a bid in which they figure—the bidders in that community submit a bid in which they use a rate that the rail-

road uses in that community, isn't that so, until the General Accounting Office passes on it?

A. You mean the tariff rate or the net rate?

Q. I mean the tariff rate.

A. Well, of course I assume they do; I don't know. Sometimes they indicate that, and then we will be able to check it. We might be able to check it anyway, but I would not be sure that they are using the rate, the rate that is local in their community at the time.

Q. They use whatever rate is in existence until the Accounting Office speaks and rules on those particular figures, isn't that so?

A. I would assume so, but I do not believe the General Accounting Office would have jurisdiction over a tariff rate. The tariff rates are quoted by the railroad to the cement people, I would say.

Q. Well, isn't it true that the land grant rates are quoted according to a formula, and until the Government 205 speaks, that formula is used by the shipper?

A. Oh, yes. You are talking about land grant now?

Q. Yes.

A. Yes. Well, that is different from the tariff.

Mr. Leisure: I think that is all.

Examiner Norwood: Any further questions?

Mr. Leisure: Just another question.

By Mr. Leisure:

Q. Have you all the bids that you have on cement? Have you them all here or did you just make a selection?

A. No, there should be a great many more.

Q. Will you make available to us during this hearing, the other bids on cement?

A. The other cases I have?

Q. During say the last eight years?

A. I will do the best I can, yes, to gather them together.

Q. And the calls that went out for them?

A. They would all be in the same file.

Mr. Leisure: Thank you very much; that is all.

Mr. Wooden: If the witness is willing to do that, I have no objection, but it seems to me that it calls for a very very large order and a very great burden upon the witness and upon the Department to select all of the bids for eight years last past.

Mr. Leisure: I think Mr. Wooden may have mis-
206 understood my request. I did not mean that I am going to ask this man to bring them all around here. I want them made available in case we want to examine them, and covering the period of the complaint. I am not asking him to bring them.

Examiner Norwood: They are Government records. I think he has a right to go and see them.

Cross-Examination by Mr. Smith.

Q. Mr. Witness, will you testify to the date of Mr. Ickes' instructions in the case of equal bids, to give the business to the most distant shipping point?

A. You say did I?

Q. Did you fix that date?

A. No.

Q. What was it?

A. Any statement I would make on that would be a guess.

Q. Approximately.

A. Within the last year. About a year.

Q. Have you got the file there on that Anardarco transaction?

A. Yes, sir.

Q. On the sheet which is the tabulation of bids, is there not a notation in pencil "Give the business to the most distant mill"?

207 A. Yes.

Q. Will you read that into the record, please?

A. (Reading) "Award made to one of the lowest bidders on the basis of the farthest removed from site."

Q. What is the date of that award?

A. That is somewhere around July 31, 1937.

Q. The instructions were before that?

A. Oh, I would say so, yes.

Q. And from the date of those instructions, you have consistently followed them?

A. Yes.

Q. Particularly in cement?

A. Not only particularly in the cement business.

Q. On all business?

A. Everything.

Q. Everything?

A. That is, everything where there are identical bids.

Q. Everything where there are identical bids. Are you not advised that that same instruction was given and the same practice followed in other departments of the Government purchasing cement?

A. I don't know what other departments are doing about that.

Q. Well, at least the cement industry through that practice has been advised that the distant mill if it
208 is able to find the price of the nearby mill, is reasonably assured of getting the business?

A. Well, they have their own rule that they follow.

Q. Well, that is not quite it. Under your practice, known to the cement industry, the distant mill if it can make the same bid as the nearby mill, is assured by reason of your practice, that the business will come to it?

A. If their bids all are identical?

Q. Yes.

A. Yes, sir.

Q. So that if it can find the figure to be made or has been made by the nearby mill, the distant mill knows it will get the business if it bids that same figure?

A. I would suppose so.

Q. Yes. Now, that of course gives the business to the mill that makes the lowest profit rather than the mill that makes the larger profit, doesn't it?

A. Well, figuring out—well, rather on the assumption that the farther the mill is removed from the point of use of the cement, the greater the freight rate, I would say yes.

Q. And it of course compels the cross-shipment of the cement wherever the business goes to the distant mill? I mean by cross-shipment, he has got to ship the cement past the nearby mill to get it to the delivery point?

A. Not necessarily. The nearest mill may be in
209 another direction.

Q. Well, assuming the nearest mill is between.

A. If the nearest mill is between the point of shipment and destination, yes, he would have to pass it through there.

Q. And the only way that he can get the business is to make a lower price as of the shipping point?

A. Of the shipping point?

Q. The price at his shipping point obviously is lower

than that nearby mill, because he has to reckon with the additional factor of freight?

A. Yes, he would have to reduce his mill price by enough to offset the difference in the two freight rates.

Q. Exactly. Then a mill in Toledo shipping from Toledo that sells in Toledo, we will say, at $1.50, to get the Government award in Chicago where he would have to ship via the Buffington mill outside of Chicago, has got to cut his Toledo price the mount of the difference in the freight to get into Chicago by the Buffington mill?

A. I would say that is obvious, yes, sir.

Q. That is obvious. Well now, with that practice and theory in force, Mr. Fry, wouldn't you agree that that would eliminate from the cement business the mills which were not located at the major points of consumption? They would always be distant mills theoretically from the point of consumption?

210 A. Theoretically, yes, that would be correct.

Q. Of course, you recognize the fact that the raw materials of cement cannot always be discovered at the major points of consumption?

A. Yes, I suppose it is fixed by nature.

Q. Exactly.

A. That is, as far as the original production is concerned.

Mr. Smith: Exactly; that is all.

Cross-Examination by Mr. Zimmerman.

Q. One question, please, Mr. Fry. I am not clear whether you said you would produce copies of your invitations to bid with specifications such as you have used since you have been in your present position with the Interior Department.

A. You mean, answering the question of counsel?

Q. Yes.

A. We will have them made available. That is what he asked for.

Q. So that we can examine them here and see what changes if any have been made—

A. (Interposing) Examine them here?

Q. Yes.

A. I think it was understood that they were go-
211 ing to be examined over in the office. Isn't that the idea?

Q. I would not care about anything else except the blank forms for that examination.

A. Blank forms?

Q. I would want a sample of each form of invitation to bid and specifications that had been used, showing the development and since you have been in that office.

A. I think I can produce those any place.

Q. Those you can produce?

A. Yes; sure.

Q. You will do that?

A. Yes.

Mr. Zimmerman: All right.

Examiner Norwood: Any further questions?

Redirect Examination by Mr. Wooden.

Q. Mr. Fry, with reference to the Monolith letter that was quoted to you on cross-examination to the effect that the government there had taken one of the land grant rates twice, I believe, do you consider that an exception to your general direct testimony, or how do you reconcile it with your direct testimony?

A. I would say that the taking of the land grant twice is an error—it was an error and is an exception to the general rule. We would not take it twice under 212 any circumstances if we were conscious of it.

Q. And was the error corrected in that case?

A. Yes. The General Accounting Office corrected it by paying to the company the additional $384.75, as I understand the case here.

Q. All right. You said, did you not, that what the government was interested in in getting bids is to know the lowest cost to it at the point where it wants to use the material.

A. That is correct.

Q. If that is all you want to know, why do you ask for f. o. b. shipment prices?

A. That is the only way we can do our own figuring to determine if that is the cheapest method of getting it at destination.

Q. In other words then, you need to know the f. o. b. mill price in order to do your figuring correctly?

A. We should know that, yes.

Q. And you are not satisfied, as I understand it, to

get merely a destination cost without the ability to figure out which is the most advantageous method of alloting the bid to the bidders?

Mr. Leisure: If the Court please, I believe these questions should be more limited than broad general ques-
213 tions of that kind. I will have to object to them. The witness is answering, I think, where land grant rates are used. It might be construed later that he is testifying to all business of the United States Government. I object to these questions unless it is specified whether they are talking about land grant rates.

Examiner Norwood: I think the counsel can make that satisfactory.

By Mr. Wooden:

Q. I would like to have you specify first, Mr. Fry, how your answer applies, if it does, applying to land grant rates on cement, and secondly how it applies to general purchases?

A. As between two given points, that is, point of origin and point of destination, if land grant lines or in agreement lines, that is lines that agree to equalize the actual rate are mixed up in the shipping or would be, then we would want the price f. o. b. shipping point to be stated so that we could figure against any other laid down price that might be given us, whether that were better for the government to take than the f. o. b. mill price, if we had one, plus the land grant rate. On cases where it was known that there is no land grant involved, such as the Atlantic Coast territory, it would not make any difference to us un-
less there were competitive bids in that would neces-
214 sitate shipping over land grant lines. Let me go one step farther. If in all the bids we got, there was no land grant involved from shipping point to destination—in shipping point to destination—then we would not care about the shipping point price—pardon me—yes, the shipping point price.

Q. You take title to the cement at the mill, as I understand it, when it is shipped on government bill-of-lading.

A. Yes, sir.

Q. Do you pay the cement shipper for the transportation?

A. Under ordinary circumstances, no.

Q. Do you pay the carrier?

A. On government bill-of-lading we pay the carrier.

Q. Then in that case, what do you consider to be the price of the cement that you pay to the cement shipper?

Mr. Leisure: Now, if the Court please, I object to that question. What he considers to be the price of the cement is not material in this case. What he does and what the facts are, are material.

Mr. Wooden: You went into that.

Examiner Norwood: He can state upon what grounds he would award the contract.

Mr. Leisure: That is not the question that he is being asked, your Honor.

Mr. Wooden: I objected to your going into it because I did not go into it on direct examination, but since
215 you went into if, we will go into it, too.

Examiner Norwood: Read the question.

(The question is read.)

Mr. Leisure: I object again.

Examiner Norwood: He could not give the legal verdict under that second point.

Mr. Wooden: It is the verdict of a practical man who is paying out government money. He ought to know what he thinks is the price.

Mr. Leisure: He can state what he does, but not how he thinks this case ought to end.

Examiner Norwood: I think you can make your question a little more satisfactory to counsel.

By Mr. Wooden:

Q. I will amplify it in this way. Do you distinguish between the price of cement and the price of transportation; when you pay the transportation to the carrier and the cement to the shipper?

A. Why, yes, we do.

Q. Then you do not consider the delivered price, the price you pay for the cement to the cement company, but the price you pay as the delivered cost, you might say, rather than the price part of which you pay to the shipper and part of which you pay to the carrier, is that right?

A. Yes, because we actually have two payees; one,
216 the cement outfit and the other the railroad.

Q. In other words, you think cement is cement and freight is freight?

A. I would say so.

Q. When you said you were interested in getting the lowest delivered price, you really meant then that you really were interested in getting the lowest delivered price?

A. I said delivered cost. That would be correct.

Q. Of the commodity and the freight combined?

A. Yes.

Q. And is that what the cement producers bid, the combination of the two items, the cement and the freight, so that you cannot disentangle them?

A. I must assume that they bid that way so that we cannot disentangle them. The fact is we cannot disentangle them because they bid the way.

Q. Now, Mr. Leisure asked you on cross-examination whether or not under the code, during the code period when open price filing was practiced, it was not the necessary result that delivered prices be identical. Do you remember that?

A. He asked if it was not the natural result.

Q. The necessary result, as I recall it.

A. Well, that was the impression I got at the time.

Q. Do you see how they could be identical unless the freight factor in those identical delivered prices were 217 also identical?

A. Well, there would have to be an adjustment somewhere in there between the cement price and the freight. If they took the identical freight figure of, we will say, the nearest point—

Q. (Interposing.) What I am getting at is, there is some identical freight factor involved there, is there?

A. Probably, yes. At least the freight factor had to be considered before they can get an identical laid down price.

Q. And on land grant bids or bids that involve the use of land grant rates, the rates are not published by the railroads.

A. The net land grant rates?

Q. Yes.

A. No.

Q. The government itself has difficulty in working them out?

A. Lots of difficulty and lots of disagreements.

Q. With the railroads?

A. With the railroads and with themselves.

Q. How far back does your experience go with reference to tie bids on cement?

A. Tie bids on cement?

Mr. Leisure: If your Honor please, this being an important issue, it seems to me the bids are the best
218 evidence, and we should not rely on this man's memory.

Mr. Wooden: It is relying on his memory and experience.

Examiner Norwood: Read the question, Mr. Reporter.

(The question is read.)

Examiner Norwood: I think he can give us that general information as to the best of his knowledge. Objection overruled.

The Witness: Oh, I would hesitate to make a guess at that. It seems to me a great many years.

By Mr. Wooden:

Q. Does it antedate the code period beginning in 1933?

A. I believe so.

Q. And has it continued since the code period?

A. I believe it has.

Q. So if it were necessary under the code that the delivered prices under the open price system be identical, can you account for such identity as had occurred before and since the code?

Mr. Leisure: Now, if your Honor please, whether he can account for that or not is wholly immaterial in this case. He can testify to facts, and I object to the question.

219 Examiner Norwood: I think that is mostly argument.

Mr. Wooden: I did not get the ruling.

Examiner Norwood: I think that that is just argument, isn't it?

Mr. Wooden: Well, I am asking the witness to interpret his experience in the light of the facts that were brought out by Mr. Leisure on cross-examination, the relation of the situation under the code to the situation since and prior.

Examiner Norwood: Will you read the question again?

(The question is read.)

Examiner Norwood: Objection overruled. He may answer.

The Witness: It seems to me that we had tie bids before the code, but we had no trouble about working out the awards, because we had a basis on which to figure mill prices and destination prices.

By Mr. Wooden:

Q. In other words, you did not have the so-called control clause in the way at that time?

A. That is correct. The control clause began—and that is what I meant by saying about the time of the code as I recall some control clause started—yes, I think
220 the most drastic one from our point of view started with the code.

Q. Now, you said in reply to Mr. Leisure's question, something to the effect that it was obvious on the face of some of these bids that the bidders had used the land grant rate in figuring their delivered prices, because of the long string of decimals used, is that correct?

A. I don't know that I said it was obvious. I said it appeared that way, because—

Q. (Interposing.) Well, do you know whether or not the actual land grant rate was used, or some estimated land grant rate?

A. No, we would not be able to tell that.

Q. Referring to some of these lump sum figures that Mr. Leisure questioned you about, did you arrive at the delivered price per barrel with this long string of decimals by dividing the quantity into a lump sum, or did you get in the first instance from the bidders a figure per barrel that contained these decimals?

A. In a number of cases, in most of the cases that I have in mind, we got a lump sum figure, but also some of the cases that—I think they had net barrel price, or rather barrel prices. Those we have here, I am speaking about.

Q. Do you always get both figures in fact; lump sum and per barrel?

A. Do we always get them?

221 Mr. Leisure: He just answered the question to the contrary.

By Mr. Wooden:

Q. Well, what are the facts whether or not you get both lump sum and per barrel figures?

Mr. Leisure: The question has already been answered, your Honor.

Examiner Norwood: Well, he may answer it again.

Mr. Wooden: It might apply differently in different cases.

The Witness: From the cases that I have personally observed, most of them are lump sum bids.

Mr. Wooden: Well, we will go into that with other witnesses in other cases.

By Mr. Wooden:

Q. Do you have any cases in your possession that you brought here in which the bids as submitted by the bidders were on a per barrel basis?

A. These two are lump sum. (Indicating.)

Q. Describe those two so that they may be identified.

A. May I say at this time that I am at a disadvantage in making a positive statement on that score, because the bid itself is not here, nor is there a copy of it. I am reading from the abstract, and the abstract shows lump sum, and I assume the bid did also, because at least

222 that is the way we should work.

Q. That is in what case?

A. That is the Monolith case. That statement applies to all of them, however.

Q. Well, my question was whether you had any cases now before you in which the per barrel figures were submitted by the bidders.

A. All right. Then I will say, reading from the abstract and not from the bid, the Monolith case for Pima and the Lehigh Portland Cement case for Anadarco—

Q. (Interposing.) What about them?

A. Those two were lump sums.

223 Q. What about that?

A. Those two are in lump sum. Here is one case to Shawnee, Oklahoma, awarded the Oklahoma Portland Cement Company, that appears to have been on a price per sack. Another Monolith case for Southern Pueblo. That is bid on a price per barrel.

Q. And what was the price per barrel?

A. The awarded price was destination $2.73.95. That was a 1934 case.

Q. Now, Mr. Fry,—you are not quite through. Pardon me.

A. I just want to fix the date. The Shawnee case was 1937.

Q. Now with regard to the purchase of other commodities than cement, do you buy coal?

A. We do.

Q. Do you get quotations there on a delivered price basis or f. o. b. mine?

A. Generally f. o. b. mine.

Q. That is a rather heavy commodity, so far as the freight cost is concerned, is it not?

A. It is. The freight frequently is worth a lot more than the coal itself.

Q. Do you buy meats and foodstuffs?

A. Yes.

Q. Are those quoted to you on a delivered price basis or f. o. b. shipping point?

224 A. I would divide my answer into two statements. There is a lot of that stuff that is bought by the man in the field and generally it is bought on a delivered price. Those are smaller quantities. We make annual contracts for the Indian Service, for instance, and the bulk of that stuff is f. o. b. shipping point.

Q. Well, there is no particular uniformity about conditions that you find in various commodities that you purchase on that particular point?

A. No, but we still adhere to the cheapest price quotations plus the freight, where we have to ship it ourselves, and frequently we get combinations of prices for an item, destination point and also shipping point, and then we have to adjust them to a common basis, which is destination.

Mr. Wooden: Nothing further.

Mr. Smith: May I ask the witness during the noon hour to get the date of the instructions of Mr. Ickes?

The Witness: Yes.

Mr. Smith: I have just one question.

Cross-Examination by Mr. Smith.

Q. At all times what you have been interested in was the price at destination representing the cost to the government, that is one thing you have been interested in, is it not?

A. The final point we are interested in, yes, is the cost to the government destination.

225 Q. Since Mr. Ickes' instructions have been issued you have also been interested in the net delivered to shipping point?

A. Since then?

Q. Yes, the year before.

A. We have always been interested in the shipping point price.

Q. Since his instructions you have been following with a definite interest—you have been trying to get the net that the mill would get at the shipping point?

A. No, we are not interested in what the mill gets out of the total price. I say we are not interested, I mean in making the rule, we are not interested in that. I am personally interested in it from curiosity, I should say, rather than an interest.

Q. In the case of equal prices, where you allot to the distant mill, then you are interested?

A. No, I do not see how we would be. We would get then a destination price, and that is all we would get.

Q. Under your instructions to allot the award to the more distant mill?

A. Then we figure out the mileage, we get the shipping point from the bidders and determine the one farthest from the point of consumption and award it to that one.

Q. The result of that is, is it not, that you give it to the mill whose shipment pays the most freight to the 226 railroad and less to the cement company?

A. That may be the outcome of it, yes, but we do not worry ourselves with that.

Q. But your instructions are to award it in such a case to the mill which has the lowest net and on the shipment which pays the most freight?

A. No, sir.

Q. Is not that the result on giving it to the most distant mill?

Examiner Norwood: I think you can argue that to the Commission without any further basis in the facts. You have already done that.

Mr. Smith: If I have done that, that is all I am interested in.

Examiner Norwood: Are there any further questions?

Mr. Leisure: No questions.

Mr. Zimmerman: I have a question or two that I would like to ask.

Cross-Examination by Mr. Zimmerman.

Q. You are interested in land grant rates and in getting them accurate, are you not, Mr. Fry?

A. Yes, sir.

Q. You can always get some land grant rates from the railroad if you inquire, but you cannot be sure whether
227 they will agree with those in the government records, is that correct?

A. Yes. Answering your question specifically, that is correct, yes. We rarely go to the railroad for land grant rates, we usually tell them.

Q. The railroad can give it, though?

A. Yes.

Q. Now has anything ever been done, to your knowledge, in all the years that this land grant rate has been going on to bring about a clarification of it, and to publish tariffs that would show land grant rates to all destinations?

A. As far as I know there has never been anything published, that is, no official publication of land grant rates. The War Department printed a pamphlet of land grant mileages showing the grants by the government to the railroads, the statutes under which the grants were made, and what part of the line the grant converted into land—or, rather, what part of the line or lines became land grants because of those acts, and they printed a map which shows in colors the different types of land grant roads, but so far as I know there has never been any publication of land grant rates, and it would be foolish to do that.

Q. Why would it be foolish to do that?

A. Well, because rates change constantly, it would be a constant changing of basic rates, and the formulas for
228 figuring land grant between given points frequently change, and in my opinion it would be just a waste of effort to publish land grant rates.

Q. Using the same reasoning, it would be a waste of effort for the railroad to publish any freight tariffs, would it not, because they change from time to time, too, do they not?

A. Well, but they are compelled to do that.

Q. Pardon me?

A. They are compelled to do that under the law.

Q. But you think if they were not compelled it would be rather foolish for them to do it?

A. No, I do not think that it will.

Q. Now could not you have tariffs for land grant rates even though they be changed?

A. Sure, you could have them.

Q. And you could have them just as well, and make your changes and formulas and publish them just as well as you can railroad tariffs?

A. The same as you can the telephone directory, or anything else.

Q. It is just that simple, if you get down to it, and put your statisticians to work, is it not?

A. Yes, if the comptroller then would, or someone, establish definitely, or fix definitely what those mileages
229 are to be, and—well, I will leave it at that.

Q. They did bring out these books when, or the booklet?

A. The War Department?

Q. Yes. When was that brought out?

A. I would say around in probably the first ten or fifteen years of the century, way back in 1910 or 1915—make it 1910.

Q. And you had the land grant map for as many years as you had land grants to the railroads?

A. Yes.

Q. And it would be possible, in your opinion, to clarify this whole situation then if the government would develop these tariffs and publish them?

A. You mean clarify the cement situation?

Q. Clarify it so that everybody would know what the land grant rates are?

A. Yes.

Q. Now the matter of a tie in any commodity that you buy, it is not surprising that that occurs frequently, is it?

A. It depends on what you mean by "frequently." I would not say it occurs frequently, except in certain lines.

Q. Well, in textiles, for example, it was not uncommon to have ties, to have tie bids even in textiles?

A. Yes.

Q. And tie bids occurred long before this control
230 clause that you talk about in various commodities, did it not?

A. Probably they did.

Q. Well, it was not the tie bid that disturbed you, it was the control clause that disturbed you, was it not?

A. That is when our trouble began, yes. Our real trouble began with the clause that was put in.

Q. And if it was not for the control clause the tie bids would not disturb you at all, they would be considered just natural, would they not?

A. The work we did would not disturb us, but we had a way to work it out. That is, provided the bidders gave us shipping point quotation as well as destination.

Q. You would not be interested in the shipping point quotation, from the practical standpoint, only where in some way it affected the destination costs?

A. Where land grant would be involved in the shipment.

Q. Only where land grant would be involved in the shipment, is that right?

A. That is all I can think of now, that is the factor that would be affected.

Q. And outside of that it does not make any difference to you at all, the thing you are interested in always is the destination cost, getting the lowest destination cost that you possibly can get for everything that you buy?

A. From a purchasing man's standpoint, yes, that 231 is all I am interested in.

Mr. Zimmerman: Thank you. That is all.

Redirect Examination by Mr. Wooden.

Q. Well, if all you want to know is the lowest destination cost why do you ever ask for f. o. b. mill prices?

A. So as to figure your lowest destination cost.

Q. Then it is not altogether true that the only thing you are interested in—strike that out.

A. That is the only thing.

Q. That is the lowest destination cost?

A. Yes.

Q. That is the thing you are interested in?

A. Yes.

Q. But your ability to get that lowest destination cost depends to some extent on whether you can calculate or get an f. o. b. mill quotation?

A. It makes us very much interested in getting mill prices. It is just as essential as anything else.

Q. Do you know whether or not it has been the policy of your department to keep confidential such information as it has with regard to land grant rates?

A. I do not think it is only our department but the government service as a whole. It has been the understanding that we will not disseminate that information.

232 Q. What is the objection to having it generally known?

A. Personally, I do not see any.

Q. If the land grant rate, however, were known would it not facilitate the planning of identical delivery prices?

A. I assume it would.

Q. But you do not know whether that is one of the reasons for not disseminating the information?

A. If it is it is now; it was not originally.

Q. Now is there such a thing entering into the land-grant calculation, such as division points and the sharing of the division between the different carriers of the total freight paid?

A. Yes. I started to mention that in connection with one of the questions asked over here, that in addition to knowing the land grant mileage as the book gave it, you would still have to get from the railroads the division of freight rates between interested lines and apply to the portion of the rate that accrued to the line that had the land grant whatever the land grant deduction was, and then eventually add your remainders together to make your total net rate.

Q. You would have to know both the division bases and the rate, would you not, to calculate it?

A. You would have to know the tariff rate and divisions, and the percentage of deduction for land grant on each one of those divisions.

233 Q. Do the railroads give out that information freely?

A. I understand the railroads do not give out the division sheets.

Q. Now in this matter of making awards to the most distant mill in case of tie bids at delivery point, I believe you testified that the result of that is to decrease the mill net of the most distant mill, or, rather, that its mill net is less than if it was awarded to the mill that was nearest to the delivery point?

A. Generally speaking, that would be correct, yes. I think there are exceptions to that, however.

Q. In other words, distance is not the only factor?

A. No.

Q. But speaking in terms of freight, that would be true?

A. Not always. That is, mileage does not always dictate the rate.

Q. That is what I am getting at. Distance is not the only thing?

A. No.

Q. But it is a constant factor and a big factor?

A. Competition lots of times fixes it.

Examiner Norwood: But your criterion in many instances in the awards is distance, is it, and not freight rates?

The Witness: Distance, yes.

234 By Mr. Wooden:

Q. And if the award were made to the nearest mill to delivery point the net return to the mill would be larger than to any other mill, would it not?

A. Theoretically, yes.

Q. So then if there be any collusive activity involved in the situation, to give the award to the most distant mill it would make it more difficult to maintain that collusion, would it not?

Mr. Leisure: If the Court please, that is clearly an improper question.

Examiner Norwood: Sustained.

By Mr. Wooden:

Q. If there would be any collusive activity involved in the situation of identical delivered prices, to consistently award the contract to the nearest mill, it would tend to facilitate and promote the interests of whatever condition was at work?

Mr. Leisure: That is precisely the same question. I make the same objection.

Examiner Norwood: It is in the alternative.

Mr. Leisure: I mean the effect is the same.

Examiner Norwood: Sustained. That is a very important question, but I think we would have to have the facts to base it on.

235 By Mr. Wooden:

Q. Do you know, Mr. Fry, whether or not any such considerations enter into the reasons for the policy of your department?

A. I do not.

Mr. Wooden: All right. That is all.

Mr. Leisure: No questions.

236 P. I. TAYLOR, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am the assistant chief of the engineering division, Bureau of Reclamation, Department of the Interior, and have occupied that position for about three years. I have been with the Bureau 32 years and am an engineer
237 by profession. For the past ten years the part which I have taken in the handling of some of the Bureau's largest construction projects is that I have passed on the bids received and the recommendations from our Denver office as to award of contracts for all kinds of material including cement. The Denver office is our main field office which is the office of our chief engineer R. F. Wallace. All of the specifications are prepared in that office and all invitations for bids are issued from that office for materials. The bids are received at Denver. The chief engineer forwards those bids to Washington where the amount involved is over $10,000 with a recommendation for award of contract. Those bids and recommendations come over my desk for checking as to the accuracy of the findings of the Denver office and in conformity to specifications. I
238 then pass them on to the legal division where the recommendation for award of contract is prepared for transmission to the Secretary of the Interior. I make my findings before they go to the legal division. The Secretary makes the approval of the award. The contract is then awarded in Denver. I have been doing that sort of service for ten years.

Q. What are the larger construction projects requiring the use of cement that have been handled by the Reclamation Bureau during your tenure of service?

A. Boulder Dam required about five and one-half million barrels, as I recall it. We purchased a large amount of cement for the Grand Coulee Dam. A considerable amount for the Marshall-Ford Dam in Texas, and several other dams, concrete masonry dams in other sections of the country, of the West.

Q. Now you spoke of the Grand Coulee Dam. Would you say that is the largest, so far as cement requirements are concerned?

A. It will be.

Q. What are the estimated requirements for it in cement?

239 A. From 12,000,000 to 15,000,000 barrels.

Q. Do you know of any other project in this country, or any other country, that required that much cement?

A. No, sir.

Q. What is the nearest to it in this country that you know of?

A. Boulder Dam.

Q. With 5,000,000 barrels?

A. About five and one-half million, possibly.

Q. Do you have figures showing the total purchases of cement by years on the part of the Bureau of Reclamation?

A. Yes.

Q. Will you state what the purchases have amounted to?

A. These are by fiscal years. 1936-1937, 2,740,673.

Q. Barrels?

A. Barrels. 1935-1936, 1,159,958; 1934-1935, 1,740,673; 1933-1934, 2,666,972; 1932-1933, 640,641; 1931-1932, 511,602.

Q. Would you say that prior to the depression the purchases of the Reclamation Bureau were very much less than they have been since?

A. Yes.

Q. Can you estimate what the average purchases per year were prior to these years that you have given in detail?

A. I could only make a wild guess, which would not 240 be accurate.

Q. I would not expect you to give exact figures, but just an estimate based on your knowledge and contact with the requirements of your Bureau.

Mr. Leisure: These records are important records. It seems to me we can bring them here if they want them. It is very easy to get them. I have not objected to even a tabulation of this kind. We are making it as easy as we can. I do not want his best guess on it, Mr. Examiner.

Examiner Norwood: Of course the records are the best evidence of how many barrels they bought, but he can testify to those purchases, if he remembers them, or he can refresh his memory and do it. You can introduce the records if you want to.

Mr. Wooden: That depends wholly upon his general knowledge.

Examiner Norwood: I think so.

Mr. Wooden: He has given the figures in detail for the last six or seven years, five or six years anyway. I just want to get some idea of the relation between those purchases and what they were before.

The Witness: This last fiscal year is 1931-1932 and that was approximately 500,000 barrels. I would say not over 200,000.

241 By Mr. Wooden:

Q. As a maximum, you mean?

A. Approximately 200,000.

Q. As a maximum?

A. Yes. That is only an estimate.

Q. I understand that is your best estimate. I suppose it goes without saying that buying such large quantities of cement the Government, or the Bureau of Reclamation, rather, has endeavored to place the business direct with the producers of cement and not with distributors or dealers?

A. Well, we simply ask for bids. We obtain them both from the manufacturers and distributors.

Q. Have you had distributors bid on some of these large projects that you have described?

A. No.

Q. Running into thousands and millions of barrels?

A. No, not that I remember.

Q. Has the Bureau of Reclamation on these large projects endeavored to obtain prices f.o.b. mill or shipping point?

A. Prior to the code we asked for bids f.o.b. mill, but the present practice is f.o.b. mill—or, rather, shipping point, and-or destination.

Q. Since the code you are asking for bids on two bases?

A. Yes.

Q. Mill or delivered?

242 A. Yes.

Q. Prior to the code you asked only for mill, is that correct?

A. There were a few cases where we purchased bulk cement and we asked for bids both ways, on bulk cement,

but in the majority of cases, with just a few exceptions, all our invitations for bids were fo.b. mill.

Q. Do you have any figures which would enable you to amplify your answer on that?

A. Yes.

Q. Will you refer to them?

A. (Referring to documents:) This tabulation is one I made up for my own information of bids received from March, 1927, to April, 1933. This does not represent all the cement purchases, but the principal purchases, I believe. There are 18 purchases listed here. We asked for bids f.o.b. mill on 15; on 3, where bulk cement was involved, we asked for bids fo.b. mill or destination. The bids received were all fo.b. mill in 14 cases.

Q. Fourteen out of how many?

A. Eighteen. Where we asked for bids f.o.b. mill or destination, where bulk cement was involved, we received,—all except one company bid fo.b. mill. One bid both mill and destination. Another case where we asked for bids f.o.b. mill or destination we received bids all f.o.b. 243 mill. That was true in the third case.

Q. As I understand it, that covers a period from 1927 down to April, 1933?

A. Yes.

Q. What has been the situation since that time? I will put it this way: What has been the situation with regard to getting f. o. b. mill bids since the code?

A. Well, we asked for bids f. o. b. shipping point and or destination. We have received bids both ways.

Q. Do you get a so-called Government destination bid when you ask for a destination price? Is that the way it is done?

A. We do not ask for destination price alone, we ask both ways but we receive either. Sometimes mill, sometimes destination.

Q. Can you say which way the prevailing basis of quotation is, whether it is mill or delivered?

A. Destination?

Q. Destination.

A. Yes.

Q. Do you consider the cases where they quoted f. o. b. mill as exceptions to the general rule?

Mr. Leisure: Now, if the Court please, whether he considers it or not, the facts speak for themselves. The pre-

ceding question has already brought out that they
244 received them both ways. Whether this witness considers them exceptions or not is not material to this case. It is incompetent and irrelevant.

Examiner Norwood: Read the question.

(The question was read.)

Examiner Norwood: He may testify as to whether he finds them to be exceptions, I suppose.

Mr. Leisure: He can testify as to the facts.

Examiner Norwood: As to how many of the one kind he received and how many of the other.

Mr. Leisure: Exactly.

Examiner Norwood: I think it is six in one and a half dozen in the other.

Mr. Leisure: One is a conclusion, Your Honor, and the other is facts.

Examiner Norwood: You can cross-examine him on that. Objection overruled. Base your answer on your experience in that respect.

The Witness: What was the question?

Examiner Norwood: Read the question.

(The question was read.)

A. I will answer that by saying to the best of my recollection most of the bids are f. o. b. destination.

By Mr. Wooden:

Q. During the time, or in the instances where you obtained bids f. o. b. mill what was the procedure in
245 determining which bid was most advantageous to accept?

A. We used either government land grant rates or special rates, or commercial rates, whichever gave us the lowest delivered cost.

Q. And how did you determine what the special rate or the land grant rate was?

A. I might say regarding rates, freight rates, that we have a rate clerk in the Denver office who figures all freight rates. We take those rates here without question in making our determination of the low bidder.

Q. But not necessarily as being the actual rate which will be the basis of settlement with the railroad?

A. Well, we of course do not know.

Mr. Zimmerman: Will the gentlemen keep their voices up just a little bit, please, sir?

Examiner Norwood: Will you speak just a little louder?

By Mr. Wooden:

Q. Did you complete your answer?

A. Yes.

Q. In passing upon bids for cement did there come a time when you found a clause attached to the bid providing that the Government's cost f. o. b. mill for the purpose of invoicing should be arrived at by deducting either the land grant or the commercial rate or special rate, which-

246 ever is lowest?

A. Yes, we have had that qualifying clause.

Q. When did you first experience that clause?

A. I could not give an approximate date, but it has been, to my recollection, since the code.

Q. You mean since the code or—

A. (Interrupting.) Well, with the code.

Q. Under the code and since, do you mean, or what?

A. Yes, we have had that qualifying clause since the code.

Q. Did you ever know of it before the code?

A. No, sir.

Q. Did your invitations to bid and specifications for the bids provide or give notice that where destination prices were bid the commercial rate of freight would be deducted?

A. Yes. Our invitation for bids contains a paragraph which gives the Government the privilege of shipping on Government bill of lading and deducting from the destination bid the commercial and adding land grant or the special rate.

Q. How did you handle your bids when they contained this clause specifying that the lowest rate, whether land grant, commercial or special, should be deducted?

A. We considered them irregular bids, when we have that paragraph in our invitation which reserves the right to ship on Government bill of lading.

Q. And considering them irregular then in that

247 respect what did you do?

A. We would throw them out.

Q. Entirely?

A. That has been our practice, to the best of my knowledge. You understand, of course, that I do not personally approve award of contracts. I pass on the correctness of the bids, I pass them on to the legal division and the final word is with the Secretary.

Q. Have there been some cases where you just ignored

that clause and proceeded to deduct the commercial rate according to your specifications instead of throwing them out entirely?

A. May I have that question?

Examiner Norwood: Read the question, Mr. Reporter.

(The question was read.)

A. I do not recall any cases.

By Mr. Wooden:

Q. Is the Grand Coulee Dam project sometimes referred to as the Columbia Basin project?

A. The Grand Coulee Dam is, I believe, a part of the Columbia Basin project.

Q. Was there a beginning towards the purchase of cement for that project, I mean by that Grand Coulee, as far back as April, 1934?

A. Yes, I believe so.

Q. Did that involve delivery of cement at Elmira, Washington?

248 A. Either Elmira or Odair. I do not recall the destination point used.

Q. Do you have with you a memorandum of yours dated April 12, 1934, addressed to the Commissioner of Reclamation?

A. Yes.

Q. Does that memorandum relate to an invitation on bids for purchasing cement for the Grand Coulee Dam?

A. Yes.

Q. What was the quantity involved?

A. 16,000 barrels.

Q. Was that the first purchase or proposed purchase for that project?

A. I am not sure. It was one of the first, if not the first. I am not sure of that.

Q. Will you state on what basis bids were requested there, as to whether delivery point or shipping point?

A. Bids were asked delivery f. o. b. cars at shipping point and-or f. o. b. cars at Elmira.

Q. Was there any further provision attached to that?

A. "Provided that in case of destination bids the Government reserves the right to have shipments made on Government bills of lading and to deduct commercial freight cost on such shipments from any payment due the contractor."

Q. How many bids did you receive on that invitation?

A. Three bids.

249 Q. Will you state who the bidders were and what they bid?

A. The Spokane Portland Cement Company, Spokane, Washington, bid $2.72 f. o. b. mill; $3.3792 destination; their shipping point being Irving, Washington.

Mr. Leisure: May we have the date fixed on this? I do not know whether it is during the code or not.

Mr. Wooden: April, 1934.

By Mr. Wooden:

Q. What is the next?

A. The Lehigh Portland Cement Company of Spokane, Washington, bid f. o. b. destination $3.3792.

Q. That was all per barrel, wasn't it?

A. Yes, per barrel, shipping from Metaline Falls, Washington. The Northwestern Portland Cement Company, Seattle, Washington, bid $3.69 per barrel, shipping from Grotto, Washington.

Mr. Leisure: Was that f. o. b., Mr. Wooden, the last one?

Mr. Wooden: Destination.

The Witness: Destination.

Mr. Leisure: Destination?

The Witness: Yes, sir.

By Mr. Wooden:

Q. Now, as I understand it, you got three bids on a destination basis and one of those three also bid on
250 the mill basis, is that right?

A. That is correct.

Q. Was the mill bid—you stated what it was, I believe. $2.72, is that right?

A. Yes.

Q. Was that the equivalent of the destination price?

A. I do not understand your question. The equivalent of the destination price?

Q. I mean after you added the Government freight cost to the mill price did it make the same destination price that was bid?

A. The Spokane Company in a letter accompanying their bid stated that the destination cost of $3.3792 was based on a mill unit price of $2.72 plus Government freight cost from Irving to Elmira.

Q. Did you have some problem to decide based on the fact which you just stated?

A. In my opinion we were prohibited from accepting this destination bid at $3.3792, shipping on Government bill of lading, and deducting commercial freight with the resulting saving.

Q. What was the amount of that saving, as you figured it?

A. I would have to figure that difference here.

Q. Well, did you have in this memorandum, made at that time, a statement of the various factors that en-
251 tered into the calculation, and as the result of which you reached the conclusion that you just stated?

A. Yes.

Q. Just give us the detail of those figures. Show us how you worked it out.

A. The Spokane bid was $3.3792 f. o. b. destination. By deducting the commercial rate and adding the Government rate, the cost, net delivered cost per barrel would be $3.269.

Q. Is that the end of the decimal?

A. (Continuing.) Taking their mill bid we arrived at a slightly different figure, making a total net cost to the Government of $54,068.80 as against $52,311.84, which would lose us approximately $1,700.

Q. Do you have those figures worked out in barrels as well as in total amounts?

A. Yes.

Q. Will you state what the barrel figures are?

A. $3.26949 as against $3.3792.

Q. Well, I wish you would take every numerical factor that entered into your calculations and show not merely the result but how you reached the result as shown in your memorandum.

A. You want the exact computation?

Q. Yes.

A. With the Government land grant rate?

252 Q. Well, on both bases, as the result of using the commercial rate deduction and as the result of using the land grant reduction, or on the mill base, either way that you want to take it.

A. In other words, do you want me to read the Government land grant rates that we used?

Q. Do you have any objection to having those known or spread here on the record?

A. Well, except that we are not supposed to—

Q. Well, I am perfectly willing to honor that objec-

tion. In this case did you follow your usual method of deducting the commercial rate and adding the land grant rate back?

A. Yes. We did that on all three bids.

Q. Did you make an award on this contract?

A. The award was made to the Northwestern Portland Cement Company.

Q. And what was its destination price bid?

A. $3.69.

Q. Well, that was considerably higher than the destination price of the other two, was it not?

A. Yes, but the—

Q. (Interrupting) How does that happen?

A. We considered the Spokane and Lehigh bids as irregular and not in conformity with the requirements of the invitations for the bids. The mill bid of the 253 Spokane Company was regular.

Q. Was there a control clause providing for the deduction of any particular freight base from the destination price?

A. The control clause?

Q. Well, or any provision in the bid to the effect that the Government should deduct the freight only in a certain way on a certain basis?

A. The Spokane and Lehigh bids both contained a statement that the destination cost was based on mill price plus the Government freight, Government land grant, which prohibited us from using the destination bids.

Q. Or deducting the commercial rates?

A. And taking advantage of the land grant.

Q. Did you get the advantage of the land grant rate on that bid that was accepted, $3.69?

A. Yes.

Q. How do you figure that you did?

A. Because they did not qualify their bid.

Q. That is the other bid was regular?

A. Yes.

Q. Now was there a letting or, rather, an invitation to bid on the Grand Coulee Dam in February, 1935, for 10,000 barrels?

A. I do not have that case with me.

Q. Perhaps these papers will enable you to re-
254 fresh your recollection.

A. There was an opening of bids for furnishing 10,000 barrels for delivery at Odair in March, 1935.

Mr. Leisure: May we have marked for identification the papers from which the witness is refreshing his recollection, please? The memorandum first and then the other. I assume that it is the bid.

Mr. Wooden: This is the same project a lot later.

Mr. Leisure: I want both documents marked so that we will know what they are.

Mr. Wooden: You mean the one he has?

Mr. Leisure: The memorandum he has been testifying from and then also the bid that you just handed him.

Examiner Norwood: They may be marked Respondents' Exhibits 1 and 2 for identification.

Mr. Leisure: Will you just describe them for the record, Mr. Wooden, so we will know what they are.

Mr. Wooden: The memorandum of April 12, 1934, relating to 16,000 barrels for the Columbia Basin project is marked for identification Respondents' Exhibit 1.

Examiner Norwood: That consists of two sheets, does it not?

Mr. Wooden: Yes. The various papers relating to the 10,000-barrel bidding, the bids were opened on February 21, 1935, and marked Respondents' Exhibit 2 255 for identification.

Examiner Norwood: How many sheets does that consist of?

Mr. Wooden: Six.

Examiner Norwood: Six sheets attached.

(The documents referred to were thereupon marked for identification "Respondents' Exhibits 1 and 2.")

By Mr. Wooden:

Q. Will you state how many bidders there were on that invitation?

A. There were 11 bids received.

Q. Will you state who the bidders were and the amounts of their bids, and whether they were on an f. o. b. mill basis or destination basis?

A. The 11 bidders were the Santa Cruz Portland Cement Company of San Francisco, California, shipping from Portland, Oregon; the Pacific Portland Cement Company of San Francisco, shipping from Redwood Harbor, California; Monolith Portland Cement Company, Los Angeles, California, shipping from Monolith, California; the Northwestern Portland Cement Company, Seattle, Washington, shipping from Grotto, Washington; Superior

Portland Cement Company, Seattle, Washington, shipping from Concrete or Seattle, Washington; Lehigh Portland Cement Company, Spokane, Washington, shipping from Metaline Falls, Washington; Spokane Portland Ce-
256 ment Company, Spokane, Washington, shipping from Irving, Washington; Calaveras Cement Company, San Francisco, California, shipping from Kentucky House, California; Olympic Portland Cement Company, Seattle, Washington, shipping from Bellingham, Washington; Henry Cowell Lime & Cement Company, San Francisco, California, shipping from Cowell, California; Yosemite Portland Cement Company, San Francisco, California, shipping from Merced, California; the delivery point was Odair, Washington.

The abstract shows that all 11 bids were f. o. b. destination $3.17 per barrel, sack allowances and cash discount 50 cents, making the net prices f. o. b. destination $2.69 per barrel.

Q. Was there any bid on the basis of f. o. b. mill?

A. Apparently not.

Q. Did the bids in this case carry the so-called control clause that we have referred to before?

A. Yes, all bids carried the control clause.

Q. Do you find the text of that clause in the papers that you have?

A. Yes.

Q. Will you read it?

A. "The U. S. Government shall determine its cost f. o. b. cars,"—there has been filled in here in pencil apparently "Portland, Oregon"—presumably one of the shipping points.

257 Q. One of the shipping points?

A. Yes. (Continuing:) "—for invoicing purposes on shipments moving on U. S. Government bills of lading to the above-named destination only by subtracting from the above-mentioned destination cost to the U. S. Government the land grant rate as determined by the U. S. Government as being applicable from"—Portland, Oregon, is here again filled in,—"to said destination, or the actual commercial freight rate, or special U. S. Government rate applicable from"—Portland, Oregon, again—"to destination, whichever is the lowest."

Q. Did all the bids contain the clause that you just read?

A. Yes.

Q. What did the Bureau do with that collection of bids?

A. Apparently the question was submitted to the Comptroller General by the Secretary of the Interior.

Q. Will you give the date?

A. On March 8, 1935.

Q. Will you say whether that was the case in which the Comptroller General rendered his opinion as shown by Commission's Exhibits 8-A and 8-B?

A. (Examining documents:) That is the same case.

Q. Well, after getting the Comptroller General's ruling what did the Bureau of Reclamation do?

A. The Commissioner recommended to the Secretary of the Interior on March 29, 1935, that all bids received
258 under the invitation be rejected.

Q. For what reason?

A. For the reason that a stipulation of the bidders, if accepted, would deprive the Government of the advantage of the land grant rate, in accordance with the ruling of the Comptroller General apparently.

Examiner Norwood: How did they know that?

The Witness: That it would deprive the Government of it?

Examiner Norwood: Yes.

The Witness: Because of the qualifying clause. The bids received were destination bids but they put in that qualifying clause in every case.

Examiner Norwood: They could not arrive at it from the figures?

(No response.)

By Mr. Wooden:

Q. Did you work out any figures in this case similar to what you worked out in the other case here in April, 1934?

A. We could not work out figures in this case.

Q. Why not?

A. Because of the qualifying clause.

Q. There have been other cases, have there not, when the qualifying clause was present and you still worked it out by deducting the commercial freight—what the
259 difference was between calculating it one way and calculating it the other?

A. We considered those bids irregular because of the conditions in our invitation for bids.

Q. All right. Were those bids readvertised on that

10,000 barrel purchase, that were rejected as the result of the Comptroller General's ruling?

A. Presumably. I do not have the case before me.

Q. (Handing documents to the witness:) I am showing you some photographic copies of records from your department. Would that enable you to answer the question?

A. We again advertised for 10,000 barrels of cement for the Columbia Basin project on April 10, 1935, opening bids on April 17, 1935. To each invitation was attached a copy of the Comptroller General's decision of March 23, 1935.

Q. On that readvertising of this same quantity who were the bidders and what did they bid?

A. We received 11 bids. May I read them?

Q. Yes, give the names of the bidders, the shipping points and the price, as you did in the other case.

Mr. Leisure: And the date.

By Mr. Wooden:

Q. Oh, yes, fix the date first.

A. The opening date was April 17, 1935. The bidders were the Santa Cruz Portland Cement Company of San Francisco, shipping from Portland, Oregon; the
260 Pacific Portland Cement Company, San Francisco, California, shipping from Redwood Harbor, California; the Monolith Portland Cement Company, Los Angeles, California, shipping from Monolith, California; the Northwestern Portland Cement Company, Seattle, Washington, shipping from Grotto, Washington; The Superior Portland Cement Company, Seattle, Washington, shipping from Concrete, Washington; the Lehigh Portland Cement Company, Spokane, Washington, shipping from Metaline Falls, Washington; the Spokane Portland Cement Company, Spokane, Washington, shipping from Irving, Washington. That may be "Irwin". The Calaveras Portland Cement Company, San Francisco, California, shipping from Kentucky House, California; the Oyympic Portland Cement Company, Seattle, Washington, shipping from Bellingham, Washington; the Henry Cowell Lime & Cement Company, San Francisco, California, shipping from Cowell, California; the Yosemite Portland Cement Company, San Francisco, California, shipping from Merced, California. All 11 bidders bid $3.17 f. o. b. destination Odair, Washington; sack allowance and cash discount 50

cents, making the net price f. o. b. destination Odair, Washington, of $2.67.

Q. Now does it appear from what you said, from what you find in your records, that the same 11 companies on the readvertisement bid exactly the same price as they did before?

A. They bid exactly the same price as before.

261 Q. Was the control clause used in that bidding?

Mr. Leisure: I suppose Mr. Wooden means as was used in the other bids. Was it used by one bidder do you mean, or by all of them?

Mr. Wooden: I will make that clear.

The Witness: Each of the bids contained the control clause.

By Mr. Wooden:

Q. Notwithstanding that you had sent the bidders a copy of the Comptroller General's ruling that the control clause could not be used?

A. Yes.

Q. What was done with these bids?

A. They were rejected.

Q. Can you say for what reason?

A. Irregular bids.

Q. Irregular for what reason?

A. I haven't the invitation before me. The Comptroller General's decision of March 23, 1935, that "funds available for the project may not properly be charged under a contract containing the stipulation in question," I think that covers it.

262 Mr. Leisure: Will you make clear for the record, Mr. Wooden, please, whether the stipulation in question refers to the control clause, so that we may have it here.

By Mr. Wooden:

Q. What was the stipulation that was referred to there in your record?

A. What we speak of as the control clause.

Mr. Leisure: Now, will you mark that also for identification, please.

Examiner Norwood: The four sheets in question will be marked Respondents' Exhibits 3-A, B, C, and D for identification.

(The documents referred to were marked "Respondents' Exhibits 3-A, 3-B, 3-C, and 3-D, for identification.")

By Mr. Wooden:

Q. Now, in August, 1935, was there another advertisement for bids for cement on the Grand Coulee Dam project?

A. Yes.

Q. What was the amount in barrels that were advertised at that time?

Mr. Leisure: Mr. Wooden, will you just start by marking them, so that I won't have to interrupt.

Examiner Norwood: The documents presented to
263 the witness consisting of 36 pages attached, will be marked Respondents' Exhibit 4 for identification.

(The documents were marked "Respondents' Exhibit 4 for identification.")

Examiner Norwood: Does the Commission contemplate putting those in evidence?

Mr. Wooden: No, I do not expect to offer them in evidence.

Examiner Norwood: Tell us what those papers are as a whole.

By Mr. Wooden:

Q. Will you do that first, Mr. Taylor? Tell us what the papers marked for identification as Respondents' Exhibit 4 consist of and relate to?

A. They relate to specifications No. 641 for Portland cement and Portland cement clinker for the Grand Coulee Dam Columbia Basin project. Bids opened on October 20, 1935. There were two schedules. Item 1, 720,000 barrels of modified Portland cement; Item 2, 720,000 barrels of standard Portland cement. Under schedule 2, Item 3, 3,500,000 barrels of modified Portland cement; Item 4, 650,000 tons of modified Portland cement clinker.

Q. Who were the bidders and what were their bids?

A. There were seven bids received, namely:

Northwestern Portland Cement Company, Seattle,
264 Washington, shipping from Grotto, Washington.

Superior Portland Cement Incorporated, Seattle, Washington, shipping from Concrete or Seattle, Washington.

Spokane Portland Cement Company, Spokane, Washington, shipping from Irvin, Washington.

Lehigh Portland Cement Company, Spokane, Washington, shipping from Metaline Falls, Washington.

Olympic Portland Cement Company, Seattle, Washington, shipping from Bellingham, Washington.

Beaver Portland Cement Company, Portland, Oregon, shipping from Gold Hill, Oregon.

Pacific Portland Cement Company, San Francisco, California, shipping from Redwood Harbor, California.

Q. Did you in that case receive bids on a destination basis?

The Witness: Only one company bid on a destination basis.

By Mr. Wooden:

Q. And which was that?

265 A. The Pacific Portland Cement Company, San Francisco, California.

Q. And was it high on a destination basis compared to the others?

A. Apparently it was high.

Q. Do I understand then that all the other bidders bid on an f. o. b. mill basis?

A. Yes.

Q. What were their bids f. o. b. mill?

A. The Northwestern Portland Cement Company bid 1.3796.

Q. Is that per barrel?

A. Per barrel on items 1, 2, and 3.

The Superior Portland Cement Company bid 1.3796 on items 1, 2, and 3.

The Spokane Portland Cement Company bid 1.53 per barrel on items 1, 2, and 3.

Q. And the other two companies that bid 1.3796, were they located at the same shipping point?

A. No. The Northwestern at Grotto, Washington; the Superior at Concrete or Seattle.

Q. All right; go ahead.

A. I might add that the Spokane was shipping from Irvin, Washington.

The Lehigh Portland Cement Company, shipping from Metaline Falls, Washington, 1.3796 per barrel for

266 items 1, 2, and 3.

Olympic Portland Cement Company, shipping from Bellingham, Washington, 1.38 per barrel on items 1, 2, and 3.

Beaver Portland Cement Company, shipping from Gold Hill, Oregon, 1.40 per barrel on item 3.

Q. Now, as I understand it, those are the f. o. b. mill prices per barrel which those companies offered in those figures?

A. Yes.

Q. And there is a variation in those mill prices, is there not?

A. Yes.

Q. How wide a variation?

A. The lowest being 1.3796, and the highest 1.53.

Q. Some 16 cents difference, approximately.

A. About 15 cents.

Q. Now, when you turned those f. o. b. mill prices that differed, into destination costs by adding what? The land grant rate?

A. Yes.

Q. What was the result?

A. The result was the net delivered cost.

The Northwestern Portland Cement Company 1.9188 on items 1, 2, and 3.

The Superior Portland Cement Company 1.9188 on 267 items 1, 2, and 3.

The Spokane Portland Cement Company, 1.9188 on items 1, 2, and 3.

The Lehigh Portland Cement Company 1.9188 on items 1, 2, and 3.

The Olympic Portland Cement Company 1.9192 on items 1, 2, and 3.

Beaver Portland Cement Company 2.2889928 on item 3.

Q. What was done with those bids?

A. Awards were made.

Q. To whom and in what quantities or proportions?

A. I might say that these companies bid for partial amounts. Do you wish to know what they did on that?

Q. Yes. I intended to ask you what those items 1, 2, and 3 were, for the sake of clarity.

A. The amounts for which bids were asked, item 1, 720,000 barrels of modified Portland cement; item 2, 720,000 of standard Portland cement; item 3, 3,500,000 barrels of modified Portland cement.

Northwestern bid on 75,000 barrels, item 1; 75,000 barrels, item 2; 375,000 barrels, item 3.

Superior bid on 350,000 barrels of item 1; 350,000 barrels of item 2; 1,650,000 barrels of item 3.

Spokane bid on 70,000 barrels of item 1; 70,000 barrels item 2, and 330,000 barrels of item 3.

268 Lehigh bid 100,000 barrels of item 1; 100,000 barrels of item 2; and 500,000 barrels item 3.

Olympic bid 140,000 barrels item 1; 140,000 barrels item 2, and 660,000 barrels of item 3.

Beaver bid on 250,000 barrels item 3.

I have not the invitation before me, but I assume items 1 and 2 were alternate, and items 3 and 4 probably.

Q. Now, we have seen that the f. o. b. mill prices varied as much as 15 or 16 cents a barrel in range from high to low. How much variation is there in the freight factor that is added there to get the destination cost?

A. Apparently 4/1000ths of a cent per barrel.

Q. And when the freight rate is added to those varying mill prices, we have an identical delivered price of what?

A. 1.9188 in all cases except Olympic 1.9192 and Beaver was out of the picture.

Q. Will you state how much was awarded on that bid to the different bidders?

A. Under item 1, Superior 350,000 barrels; Lehigh 100,000 barrels; Northwestern 75,000 barrels; Spokane 70,000 barrels; Olympic 125,000 barrels.

Under item 3, Superior 1,650,000 barrels; Lehigh, 500,000 barrels; Northwestern, 375,000 barrels; Spokane, 330,000 barrels, and Olympic, 645,000 barrels.

Q. How did the price in that case compare with
269 prices bid on the previous advertisements for the Grand Coulee Dam?

A. The previous bids, as I recall, 3.17 f. o. b. destination. These bids were approximately 1.92 destination. That 3.17 was probably qualified by—not qualified by but subject to discount.

Q. I believe you said it was.

A. Yes. At 2.67.

Q. In other words, 2.67 compared with 1.92?

A. Yes.

Q. How much time was there between the advertisements to which those prices applied?

A. As I recall, the 10,000 barrels was in April, 1935, and these bids were in August, 1935.

Q. Was there any control clause involved in that bidding?

A. You refer to this bid?

Q. To the August, 1935? They were practically all f. o. b. mill.

A. Apparently there was no qualification or no control clause stipulation.

Q. And yet your destination cost came out for the majority there with 1.9188, is that right?

A. Yes.

Q. Are you familiar with the invitation for bids on that Grand Coulee Dam for the August, 1935 letting?

A. Yes.

270 Q. I am showing you a printed pamphlet. Does that contain the specifications and the invitation to bid?

A. Yes.

Q. Did you ask in that case in your invitation for bids only f. o. b. mill, or did you ask for them both f. o. b. mill and f. o. b. destination?

A. We asked for bids both ways.

Q. But you got only f. o. b. mill from all but one, is that correct?

A. All but one.

Q. I call your attention to a paragraph on page 11 of your printed invitation under the head of "deliveries." Will you read into the record—

Mr. Leisure: (Interposing.) Won't you mark those documents, Mr. Wooden? I cannot follow them unless you do.

Mr. Wooden: This is a printed invitation for bids, schedules and specifications, Portland cement and Portland cement clinker for Grand Coulee Dam. Specification No. 641 and bears on the outside cover a statement that the bids would be received until August 20, 1935. Do you want it marked otherwise?

Mr. Leisure: I just want it marked for identification.

Examiner Norwood: You are not going to have 271 that offered in evidence?

Mr. Wooden: No.

Examiner Norwood: Mark it Respondents' Exhibit 5 for identification.

(The document was marked "Respondents' Exhibit 5 for identification.")

By Mr. Wooden:

Q. Will you please read into the record, Mr. Taylor, that portion of the paragraph indicated down to the place where I have put the pencil mark?

A. This is paragraph 8, "deliveries"—"Each item of the schedules is so prepared as to permit bids either on the basis of delivery f.o.b. cars at the shipping point or f.o.b. cars at Odair, Washington, at the option of the bidder. Under bids providing for delivery f.o.b. cars at the shipping point, all material shall be shipped on government bills-of-lading, and the cost of transportation from the shipping point or points stated in the schedule to Odair, Washington, will be paid by the government. Under bids providing for delivery f.o.b. cars at Odair, Washington, all material shall be shipped on commercial bills-of-lading, and the cost of transportation from the shipping point or points, which shipping point or points must be stated in the schedules, to Odair, Washington, shall be paid by the contractor and included in the prices bid in the sched-
272 ules: Provided, that the government reserve the right to require shipment on government bills-of-lading, in which case the government will deduct from any payments due the contractor, the cost of transportation from the shipping point or points as stated in the schedules to Odair, Washington of the total shipping weights at commercial freight rates."

Q. The bids, however, being practically all on a f.o.b. mill basis, that particular provision had no application in this transaction here, is that right?

A. No application except in computing one bid which did not enter into the award.

Q. I am now handing you, Mr. Taylor, a collection of papers marked for identification as Respondents' Exhibit 6, consisting of 17 sheets, and I believe all relating to the purchase of cement for the Hamilton and Arnold dams, the Colorado River project Texas. Will you state the date, the amount of the cement to be purchased, who the bidders were and what their bids were.

(The papers identified were marked "Respondents' Exhibit 6 for identification.")

The Witness: These were bids under our specifications No. 766-D, and covered cement for the Hamilton and Arnold dams, Colorado River project Texas. The amount involved seems to be 365,000 barrels.

273 By Mr. Wooden:

Q. What was the date?

A. The bids were opened February 10, 1936.

Q. Who were the bidders and what was the amount of the bids?

A. Four companies submitted bids. The Universal Atlas Cement Company of Chicago, Illinois, shipping from Atco, Texas.

Republic Portland Cement Company, San Antonio, Texas, shipping point Longhorn, Texas.

Trinity Portland Cement Company, Dallas, Texas, shipping from Fort Worth, Texas.

Lone Star Cement Company, Dallas, Texas, shipping from Dallas or Fort Worth.

There are three schedules, items 1 and 2 under schedule 1; item 3 under schedule 2, and item 5 under schedule 3. Apparently alternate bids were asked. All bids were alike, f.o.b. Beverly, Texas.

Q. Is that destination?

A. Yes.

Q. Did you get any f.o.b. mill bids there?

A. No.

Q. Were they asked for?

Mr. Leisure: He has already answered that.

By Mr. Wooden:

Q. If you think you did answer that, Mr. Taylor, all right.

274 A. I don't remember answering it.

Examiner Norwood: It won't do any harm to answer it again if there is any doubt about it.

The Witness: This refers to paragraph 8 of the specifications. We asked for delivery f.o.b. cars at—and then it refers to paragraph 8 of the specifications, which we do not have here.

By Mr. Wooden:

Q. All right, we will pass that. You cannot tell from what you have before you whether bids f.o.b. mill were asked for?

A. No.

Q. Were any land grant rates involved in this transaction?

A. No.

Q. That is true generally of Texas, as I understand it?

A. Yes.

Q. How was the award made in that case?

A. The award apparently was made to the Republic Portland Cement Company.

Q. On what basis? Was it made by lot or drawing or how?

A. Made by a decision of the Secretary.

Q. Does the basis of the decision appear?

A. On the basis of the nearest shipping point.

Q. Is the reason for awarding it to the mill at the nearest shipping point given?

275 A. Loss of cement by sifting in transit, and the expiration of time for acceptance.

Q. Did you hear Mr. Fry's testimony this morning?

A. Yes.

Q. In regard to the policy of awarding cement bids to the most distant mills?

A. Yes.

Q. Is this an exception to that or is it a change in policy?

A. I could not say it was a change in policy. It was a different method of arriving at it.

Q. Do you know of any other cases where the award has been made to the nearest mill rather than the farthest?

A. I believe the purchase of cement for this particular project was awarded for the same reason.

Q. Do you know of any others?

A. I think that factor has been taken into consideration, but I do not recall any specific cases of that kind right now.

Q. Did that purchase there involve shipping in large lots, in bulk, in other words?

A. Yes, this is bulk cement; as I recall.

Q. How is bulk cement shipped? What safeguards are adopted to prevent loss in transit?

A. It is shipped, as I understand it, in specially prepared cars.

276 Q. How specially prepared?

A. Never having seen any of those cars, I could not say.

Q. Are they freight cars or boxcars?

A. As I understand it, they are boxcars especially prepared for that.

Q. Any special lining or anything of that kind?

A. So I understand, yes.

Q. In case there were any loss from sifting in transit, would the government have to stand that, or is that the contractor's responsibility?

A. They have never been able to figure that out.

Q. Have you had any dispute about it with contractors?

A. Not to my knowledge. That would be out of my province.

Q. Now, on this case was there an allowance made by the bidder from their quoted price to offset the cost of the making of bills-of-lading because shipped on government bill-of-lading?

A. Yes.

Q. What was the amount that was allowed by the prospective bidders on that item?

A. Under item 1, the four companies bid 2.3422, and 2.2422.

Q. Per barrel?

A. Yes.

Q. This was in Texas, as I understand. There were no land grant rates involved, is that right?

277 A. No land grant rates involved.

Q. Yet you have those decimals?

A. Yes.

Q. All right, go ahead. What was the amount of the allowance for the government bill-of-lading being made and not having to be made by the bidder?

Mr. Leisure: Your Honor, it seems to me that this witness is not really refreshing his memory from these documents. He has not the slightest recollection. It is perfectly apparent. It seems to me where that is apparent, the document should be the best evidence, so that we can all have them and know what they are.

Examiner Norwood: If he can give us these excerpts, and these are documents that he has passed on officially, it will make a shorter record. Then that gives you the privilege of putting them in the record later if you want to.

By Mr. Wooder:

Q. These things came before you and over your desk in the ordinary course of your duties there at the Bureau?

A. Yes.

Q. You were familiar with them at the time, is that correct?

A. Yes. I have not the figures before me here to make a statement, but I know that there was an allow-
272 ance made if the Bureau shipped on the government bill-of-lading.

Q. There is a reference made in the paper there to a saving of $1,916?

A. Yes.

Q. Would you say whether that was on that account?

A. The four companies submitted alternate bids on each item. The bids f.o.b. mill and shipment by government bill-of-lading being slightly lower than for delivery f.o.b. destination, and shipment by the company or companies on commercial bills-of-lading, and the saving of $1,916 would result from the shipping on the government bill-of-lading.

Q. $1,916 saving on the government bill-of-lading for how many barrels?

A. 365,000.

Q. Will you figure out how much per barrel that saving amounted to?

A. Approximately .005 per barrel.

Q. You did not carry it all the way out beyond that point, did you?

A. No.

Q. It would result in several other figures, wouldn't it?

A. Yes.

Q. When you take .005, what does it mean? Is that 5/1000ths of a cent?

A. Yes.

279 Q. 5/1000ths of a cent per barrel. Each bidder bid the barrel price f.o.b. desination of how much?

A. It is 5 mills, it is a half a cent.

Q. Each bidder bid a barrel destination price of how much?

A. 2.3422.

Q. Did each bidder offer to save the government this 5 mills per barrel if the government would make out the bill-of-lading and take care of that?

A. Yes.

Q. Would you mind extending your calculation two or three more decimal places, Mr. Taylor?

A. .005249, which is not exact.

Q. Well, now, if you had used the 5 mills which you

suggested a moment ago and applied it to 365,000 barrels, what would have been the gross amount?

A. Do I understand your question applying that to the 365,000 barrels, what would be the result?

Q. Yes.

A. $1,916. Is my mathematics wrong?

Q. There is another calculation here which is different, and I just wanted to make sure which was right.

A. Multiplying .005249 by 365,000 results in 1915.885, if my arithmetic is correct.

Q. You misunderstood what I asked, but I am satisfied with the answer nevertheless. Now, I will ask you
280 to calculate what the saving would have been if you had used the round figure of 5 mills instead of 5249 as you did. That was my original question.

A. 1825.

Q. So then, this saving of 1916 was attached to the bids f. o. b. destination of how much per barrel?

A. The bids were for the four items, and are 2.3422; 2.799; 2.799; and 2.3422, but I do not have before me the bids providing we ship on government bill-of-lading.

Q. Well, at any rate, in order for each of the bidders to offer that saving of 1916, it was necessary for each of them to calculate that according to a figure of .005249, is that right?

A. That was the difference per barrel in the amounts quoted.

Q. They quoted per barrel?

A. Yes.

Q. Coming back to this matter of awarding that contract to the nearest mill, rather than the most distant one, do your papers there show what the difference in distance is between the mills, or so that you can tell us?

A. Universal Atlas Cement Company shipping from Alco, Texas, distance to Beverly 159.1 miles; Republic, San Antonio, Texas, shipping from Longhorn, distance to Beverly, Texas, 147.3 miles; Trinity, shipping from Fort Worth, Texas, distance to Beverly 245 miles; Lone Star shipping from Dallas or Houston, distance to Beverly
281 250.4 or 241.4 miles.

Q. The greatest distance was what? And the smallest distance was what?

A. The greatest distance was 250.4 miles and the smallest distance 147.3 miles.

282 Washington, D. C.,
Friday, December 3, 1937.

286 PERCY I. TAYLOR thereupon resumed the witness stand on behalf of the Commission, and testified further as follows:

Direct Examination by Mr. Wooden.

Q. Mr. Taylor, yesterday afternoon you were testifying regarding certain allowances made by the bidders on
287 —what was it—the Hamilton Arnold Dam project, the Colorado River project in Texas,—certain allowances made for the Government making out the bill of lading and using Government bill of lading. Do you have any data that will further clarify or supplement that testimony of yesterday afternoon?

A. Yes, sir.

Q. Will you state what it is?

Mr. Leisure: Again, may we have the witness identify what he is reading from?

Examiner Norwood: Yes.

Mr. Leisure: If you are going to use that memorandum and read from it, I ask to have that numbered also.

The Witness: These are some notes of my own.

Mr. Leisure: Will you just mark them with the exhibit number?

Examiner Norwood: The memorandum there may be marked Respondent's Exhibit 7 for identification.

(The memorandum referred to was thereupon marked for identification "Respondents' Exhibit 7.")

Examiner Norwood: And the bound pamphlet will be marked Respondents' Exhibit 8 for identification.

(The pamphlet, Specification No. 766-D, was thereupon marked for identification "Respondents' Exhibit 8.")

288 By Mr. Wooden:

Q. Where it appears, Mr. Taylor, that you are basing your testimony upon Respondents' Exhibits 7 and 8 for identification, will you so state?

A. This Exhibit No. 8 is a copy of Specification No. 766-D, Portland cement for the Hamilton Dam and Arnold Dam, Colorado River project, Texas.

We asked for bids as follows: Schedule No. 1, Item 1, standard Portland cement in bulk, 20,000 barrels.

Item No. 2, standard Portland cement in cloth sacks, 5,000 barrels.

Under Schedule No. 2, Item No. 3, modified Portland cement in cloth sacks, 290,000 barrels.

Item No. 4, standard Portland cement in cloth sacks, 290,000 barrels.

Items 3 and 4 under Schedule No. 2 are all tentative items.

Schedule No. 3, Item No. 5, modified Portland cement in bulk, 50,000 barrels.

Item No. 6, standard Portland cement in bulk, 50,000 barrels.

Items 5 and 6 under Schedule No. 3 are all tentative items.

We asked for delivery f. o. b. cars at—and referred to Paragraph 8 of the specifications which reads "Deliv-
289 eries: Each item of the schedules is so prepared as to permit bids either on the basis of delivery f. o. b. cars at shipping point or f. o. b. cars at Beverly, Texas, at the option of the bidder. On the bids providing for delivery f. o. b. cars at shipping point, all materials shall be shipped on Government bills of lading, and the cost of transportation from the shipping point or points stated in the schedules to Beverly, Texas, will be paid by the Government. Under bids providing for delivery f. o. b. cars at Beverly, Texas, all materials shall be shipped upon commercial bills of lading and the cost of transportation from the shipping point or points, which shipping point and/or points must be stated in the schedules to Beverly, Texas, shall be paid by the contractor and included in the unit prices bid in the schedules, provided that the Government reserves the right to require shipment on Government bills of lading, in which case the Government will deduct from any payment due the contractor, the cost of transportation from the shipping point or points stated in the schedules, to Beverly, Texas, on the total shipping weights at commercial freight rates."

That is a portion of Paragraph 8. The remainder of the paragraph is estimated deliveries required.

As I stated yesterday, we received four identical bids from the Universal Atlas Cement Company, Chicago,
290 Illinois, shipping from Atco, Texas; the Republic Portland Cement Company, San Antonio, Texas, ship-

ping from Longhorn, Texas; the Trinity Portland Cement Company, Dallas, Texas, shipping from Fort Worth; the Lone Star Cement Company, Dallas, Texas, shipping from Dallas or Fort Worth, Texas.

The bids on Item 1 of Schedule 1—

Q. (Interrupting) Are you now referring to the memorandum which is marked Respondents' Exhibit 7 for identification?

A. I am now referring to No. 7. The identical bids received were:

Schedule 1, Item 1, 2.353 per barrel.
Schedule 1, Item 2, 2.803 per barrel.
Schedule 2, Item 3, 2.803 per barrel.
Schedule 2, Item 5, 2.353 per barrel.

I am only reading one of the alternative bids.

These bids were based on shipment on commercial bill of lading delivered at Beverly, Texas.

Mr. Leisure: These were opened February 10, 1936?

The Witness: The bids were opened February 10, 1936. The four bids contained alternate bids on the various schedules providing for the use of Government bills of lading. The alternate bids contained the so-called qualifying clause.

By Mr. Wooden:

Q. Do you mean by that what is sometimes referred
291 to as the control clause?

A. Yes.

Q. Providing for the deduction whichever rate was lower?

A. Yes. The bids using Government bill of lading were as follows:

Q. (Interrupting) Do I understand now that what you are now about to give are the figures that were submitted by the bidders?

A. In their alternate bids.

Q. All right.

A. Schedule 1, Item 1, 2.3422 per barrel.
Schedule 1, Item 2, 2.799 per barrel.
Schedule 2, Item 3, 2.799 per barrel.
Schedule 2, Item 5, 2.3422 per barrel.

As before, I am only reading one of the alternative items.

The bidders allowed 10 cents per barrel discount and 50 cents discount in sacks allowance.

The award was made to the Republic Portland Cement Company on April 9, 1936. The amount of the contract is $835,159. Shipping on Government bill of lading.

Q. Did you testify yesterday afternoon regarding this particular bidding, that the contract was awarded to the most distant mill among those who bid?

A. No.

292 Q. Not in this case?

A. No. The Republic is the nearest mill.

Q. I should have said that myself; that is right. That is what I understood you to testify yesterday. I note among the papers, Respondents' Exhibit 6 for identification, a photographic copy of a letter from Acting Commissioner Page—a memorandum to the First Assistant Secretary dated March 25, 1936, in which he makes some comments regarding the loss of cement in transit. Will you state what the communication has to say on that point?

A. The Acting Commissioner, in a memorandum to the First Assistant Secretary, March 25, 1936, in discussing the method of shipping bulk cement, said:

"Bulk cement is shipped in specially prepared railway cars to avoid loss in transit, and the cost of preparation of cars is included in the unit price as bid. The contractor will be responsible for and make good any loss in transit due to improper preparation of railway cars. Unloading bulk cement requires special machinery."

Q. I understand, however, that the bid was awarded to the nearest mill in that case.

A. Yes.

Q. In our discussion yesterday about bidding on the Grand Coulee Dam of August, 1935, I used the term frequently in my questions referring to a land grant rate.

293 Was there a land grant rate actually in that bidding, or some other kind of a rate?

A. I understand that special rates apply on those railroads in connection with deliveries of cement from mills in Washington to the Grand Coulee project, but I am not familiar with the rates. And the use of the word "land grant" on this abstract of bids simply means that this was a standard form, apparently, and did not keep up with the change.

Q. The figures were really a special rate rather than a land grant rate?

A. I presume they were, although I am not familiar with the rates used in that particular job.

Q. On the prior bidding for the Grand Coulee in March, 1935; does the abstract there show a special rate or a land grant rate?

A. It shows both.

Q. Do you know which one was used by the bidders?

A. By the bidders?

Q. Yes.

A. Well, we have of course—there is no way of telling what rates the bidders had in mind, because they gave us a destination bid.

Q. I asked if you knew. Was that special rate something that was public or published?

A. I understand that those special rates are published.

294 Q. Available to anybody?

A. They are railroad rates, and we make them public, as far as I know.

Q. Now, I believe yesterday afternoon you gave us the figures on the Grand Coulee bidding in the spring of 1935 as compared with the figures in August, 1935, showing a considerable difference in the prices bid?

A. Yes.

Q. Will you tell us just what that difference amounted to?

A. The bids opened February 21, 1935, under Invitation No. 38067-B-1, the net price f.o.b. destination $2.67, which provides for sack allowance and cash discount of 50 cents.

Q. In other words, that has already been taken off before you get the $2.67, is that right?

A. Depending upon the actual sack allowance.

Q. Do you have a comparable figure with that $2.67 in the August 25 bid?

A. These are bids received under Specification No. 641 on August 20, 1935. The net delivered cost is $1.9188 for the four bidders, and $1.9192 for the fifth bidder.

Q. Making a difference between the prices on the two bids of—will you check me as to whether or not it is approximately 75 cents a barrel?

A. Yes, 75 cents.

Q. Is there anything that happened between the
295 filing of those $2.67 bids and the filing of the $1.9188 bids several months later than explained that difference of 75 cents per barrel?

297 A. Not to my own knowledge.

Q. Did there come to you, in the course of your official duties at the Bureau of Reclamation, knowledge of any proposal that the Government build its own mill?

A. Those matters would not be handled by me. Although I might have seen the correspondence the matters were not handled personally by me.

302 Q. Can you tell me, Mr. Taylor, whether or not
303 this special rate, railroad rate that was made for Grand Coulee, was made between the biddings in the spring of 1935 and the August, 1935, bids, or whether it applied to the early bids in 1935?

A. I would not know that. Those questions are all handled by our Denver office, and while we see copies of the correspondence I could not remember when those rates applied.

Q. Did you ever see the special rate contract?

A. Not that I remember. I may have. I sometimes have occasion to refer to them, but I do not recall that.

Q. Now will you give us the facts as you did in other cases regarding the biddings on the Stewart Mountain Dam, Salt River project?

Mr. Leisure: Will you have that marked?

Examiner Norwood: Mark it Respondents' Exhibit 9 for identification, containing six sheets.

(The document referred to was marked for identification "Respondents' Exhibit No. 9.")

By Mr. Wooden:

Q. Let it appear that your testimony now is drawn from papers marked "Respondents' Exhibit 9". If you depart from the papers why, let us know.

Examiner Norwood: The papers consist of what? Of correspondence from your office?

The Witness: Yes.

Examiner Norwood: I just want a little descrip-
304 tion for the record. What is the date of the first one there?

The Witness: This refers to bids for cement, invitation 42558-B, for 7,000 barrels, for the Stewart Mountain Dam, Salt River project, Arizona; bids opened March 20, 1936.

We received eight bids from the following companies: Monolith Portland Cement Company, Los Angeles, Cali-

fornia, shipping point Monolith; California Portland Cement Company, Los Angeles, California, shipping point Colton, California; Riverside Cement Company, Los Angeles, California, shipping point Crestmoore, California; Southwestern Portland Cement Company, Los Angeles, California, shipping point El Paso, Texas; Graham Brothers, Incorporated, Los Angeles, California, shipping point Long Beach, California; Pacific Portland Cement Company, San Francisco, California, shipping point Redwood Harbor, California; Santa Cruz Portland Cement Company, San Francisco, California, shipping point Davenport, California; Henry Cowell Lime & Cement Company, San Francisco, California, shipping point Cowell, California. All bids were f.o.b. Mesa, Arizona, except the California Portland Cement Company, which bid f.o.b. Colton, California, and the Henry Cowell Lime &
Cement Company, which bid f.o.b. Cowell, Cali-
305 fornia.

By Mr. Wooden:

Q. What were the amounts bid?

A. The Monolith, Riverside, Southwestern, Graham Brothers, Pacific Portland and Santa Cruz bid $3.32 per barrel f.o.b. Mesa, Arizona, less 60 cents sack allowance and discount. The California Portland Cement Company, according to this abstract, bid $2.123 per barrel f.o.b. mill. The Cowell Company bid $1.65 per barrel f.o.b. mill. The Cowell bid was subject to a 50-cent discount and sacks allowance.

Q. To whom was the award made?

A. The award was made to the Pacific Portland Cement Company of San Francisco.

Q. Was that one of the $3.32 delivered bidders?

A. Yes.

Q. Why was the award not made to one of the mill bidders, low f.o.b. mill bidders?

A. The net delivered cost from the bid of the Pacific Portland Cement Company was the lowest.

Q. I call your attention to one paper among this collection, a photograph of an invoice from the Pacific Portland Cement Company to the Bureau of Reclamation, is that correct?

A. Yes. Apparently this is an invoice from the Pacific Portland Cement Company.

Q. What would you say as to whether or not the
306 invoice shows that commercial freight was deducted from the delivered price in that company's invoice?

A. Yes.

Q. You said the amount, I believe, that was involved in that bid—or did you?

A. I gave the bid price as $3.32.

Q. I mean the quantity, the number of barrels.

A. I believe so. 7,000 barrels.

Mr. Wooden: I ask to have this marked Respondents' Exhibit 10, containing five sheets.

(The papers referred to were thereupon marked for identification "Respondents' Exhibit 10.")

307 By Mr. Wooden:

Q. How many were $3.32 delivered to Mesa?

A. All but two.

Q. And all the others on a mill base, they did not work out to be on a comparative basis with the $3.32 delivered, they were f.o.b. mill, and then when you added the freight rate they were higher, is that correct?

A. Yes.

309 Examiner Norwood: I think the pleadings are sufficiently broad to bring in this testimony as to this pricing and bidding. The whole thing is involved. I shall not classify this testimony broadly at this time but I will rule on the evidence as it comes in. If anything is irrelevant and it is to such an extent that I feel I have no choice in the matter but to exclude it I will exclude it, and I feel I have no choice in the matter but to let it in I will let it in.

Mr. Leisure: Then it will be admitted subject to our general motion to strike if it is not material or relevant?

Examiner Norwood: Just as all the other testi-
310 mony. The objection is overruled. Read the question, Mr. Reporter.

(The question was read.)

Examiner Norwood: We will take about a ten minutes recess.

(Whereupon a short recess was taken.)

Examiner Norwood: The hearing will come to order. You may proceed, gentlemen.

By Mr. Wooden:

Q. Will you read the last question, Mr. Reporter?

(The question was read.)

By Mr. Wooden:

Q. Will you give us the same information regarding that bidding that you have given in preceding cases?

A. These papers marked Respondents' Exhibit No. 10 refer to bids opened on April 9, 1937, under Invitation 25571-A, covering cement for the Caballo Dam, Rio Grande project, New Mexico-Texas. The invitation called for 8,000 barrels of cement in paper sacks under Item No. 1, and 8,000 barrels of cement in cloth sacks under Item No. 2.

Three proposals were received from the following companies: Southwestern Portland Cement Company, El Paso, Texas; United States Portland Cement Company, Denver, Colorado; Colorado Portland Cement Company, Denver, Colorado. The Southwestern shipping point is El Paso, Texas. The United States Portland Cement
311 Company and the Colorado Portland Cement Company both ship from Portland, Colorado. The destination point is Hatch, New Mexico.

The Southwestern Portland Cement Company bid $2.59 per barrel on Item 1, f.o.b. destination, and $2.85 per barrel on Item No. 2, f.o.b. destination.

The United States and the Colorado companies both bid $2.15 f.o.b. Portland, Colorado, on Item No. 1, and $2.40 per barrel f.o.b. Portland, Colorado, on Item No. 2.

The award was made to the Southwestern Portland Cement Company under Item No. 2. I might add that those were all alternative items, Items 1 and 2. The award was made to the Southwestern Portland Cement Company of El Paso, Texas, under Item No. 2 covering 8,000 barrels of standard Portland Cement in cloth sacks.

The bidder's price was—there is a cent difference here in these two papers apparently. One statement shows the price of $2.84 per barrel f.o.b. destination and the abstract shows $2.85.

Q. Was commercial freight deducted in that case from the destination price?

A. Yes.

Q. And this occurred in April, 1937?

A. Yes.

Q. What about the Comptroller General's ruling
312 of January, 1937, about the control clause, did that enter into this case?

A. There is nothing here to show that there was a control clause, that I see.

Q. If there were no control clause then there would be nothing in the way of your deducting the commercial freight?

A. No.

Mr. Wooden: I ask to have this marked Respondents' Exhibit 11, containing four sheets.

(The documents were marked for identification "Respondents' Exhibit 11.")

By Mr. Wooden:

Q. Showing you now a collection of papers marked Respondents' Exhibit 11 for identification, relating to bids on the Truckee storage project in May, 1937; will you give the facts regarding that bidding?

A. These papers, Respondents' No. 11, show bids opened at Denver, on May 3, 1937, under Invitation No. 26019-A, covering 9,000 barrels of cement for the Truckee storage, Nevada, California. The Bureau received six bids, from the Cowell Portland Company, San Francisco, shipping from Cowell, California; the Pacific Portland Cement Company, San Francisco, California, shipping from Redwood City, California; Yosemite Portland Cement Corporation, San Francisco, California, shipping from Merced, California; Calaveras Cement Company, San Francisco, California, shipping from Kentucky House, California; Monolith Portland Cement Company, Los
313 Angeles, California, shipping from Monolith, California, and the Santa Cruz Portland Cement Company, San Francisco, California, shipping from Davenport, California. All bids were f.o.b. destination.

Q. Were bids asked for f. o. b. mill?

A. Apparently bids were asked for delivery at shipping point and/or Boca, California. The Cowell bid was $2.605 per barrel; Pacific, $2.652 per barrel; Yosemite, $2.818206; Calaveras bid the same, $2.818206; Monolith bid $2.83499; Santa Cruz, $2.86544.

Q. To whom was the award made?

A. The award was made to the Cowell Portland Cement Company.

Q. On what grounds?

A. In the amount of $2.605 per barrel f. o. b. destination.

Q. Was commercial freight deducted in that case?

A. Yes.

Q. Was there any control clause involved?

A. The papers do not indicate any control clause.

Mr. Wooden: I ask to have this marked Respondents' Exhibit 12, containing seven sheets.

(The documents referred to were marked for identification "Respondents' Exhibit 12.")

By Mr. Wooden:

Q. Showing you now a collection of papers
314 marked for identification as Respondents' Exhibit 12, relating to bidding on the Marshall Ford Dam, Colorado River project, Texas, in July, 1937, or June, 1937. Will you state the facts as you did in the other cases?

A. This is Respondents' No. 12. Bids opened at the Denver office of the Bureau of Reclamation on June 21, 1937, under Specifications No. 934-D, covering 200,000 barrels of low heat Portland cement for the Marshall Ford Dam, Colorado River Project, Texas.

Four bids were received: From the Republic Portland Cement Company, San Antonio, Texas, shipping from Longhorn, Texas; Trinity Portland Cement Company, Dallas, Texas, shipping from Fort Worth or Houston, Texas; Universal Atlas Cement Company, Chicago, Illinois, shipping from Atco, Texas; Lone Star Cement Corporation, Dallas, Texas, shipping from Houston, Texas. The destination point is Rutledge, Texas. The bids were f. o. b. destination. A discount of 10 cents per barrel.

Q. Pardon me there. Were bids asked for on f. o. b. mill basis?

A. I want to refer to a copy of those specifications.

Q. Yes.

A. Do you want to mark this?

Examiner Norwood: Yes, if you are going to testify about it.

315 Mr. Wooden: Give it the same number, I think.

Examiner Norwood: Mark it Respondents' Exhibit 13.

(The document referred to was marked for identification "Respondents' Exhibit 13.")

Examiner Norwood: Will you please describe that paper that has just been marked Respondents' Exhibit 13 for identification?

The Witness: This is a copy of the specifications No. 934-B, sent to the various cement companies.

Examiner Norwood: It refers to the same matters that Respondents' Exhibit 12 for identification refers to?

The Witness: Yes. I read from Paragraph 8, deliveries, which reads:

"The schedule is prepared so as to permit bids either on the basis of delivery f. o. b. cars at the shipping point or f. o. b. cars at Rutledge, Texas, at the option of the bidder."

By Mr. Wooden:

Q. All right. The bids were all f. o. b. destination, as I understand it?

A. Yes. The Republic bid $2.06 per barrel on 60,000 barrels. Trinity bid $2.09 per barrel on 200,000 barrels.

Q. Which was the entire quantity, the entire amount?

316 A. Yes. Universal bid $2.13 per barrel on 50,000 barrels. Lone Star bid $2.25 per barrel on 50,000 barrels.

Q. What was the kind of cement that was involved in this case?

A. This was a special cement described as low heat Portland cement.

Q. Not the standard cement?

A. No.

Q. What is low heat cement?

A. It is a special cement which the Bureau has used in recent years in some of their construction of dams, which requires a different composition than the ordinary cement.

Q. It is not the same, it is higher in strength than the standard?

A. No, the specifications are different.

Q. Who was awarded the bid in that case?

A. The award was divided between the Republic Portland Cement Company and the Trinity Portland Cement Company. The Republic Portland Cement Company receiving an award for 75,000 barrels, an increase of 25 per cent over the quantity they proposed to furnish, and the Trinity received a contract for 175,000 barrels, which is 25,000 barrels less than the quantity offered by that bidder.

Q. Does that mean that the two low bidders took the entire amount between them, they were given the en-

317 tire amount between them?

A. Yes.

Mr. Wooden: I ask to have this marked Respondents' Exhibit 14, containing six sheets.

(The documents referred to were marked for identification "Respondents' Exhibit 14.")

By Mr. Wooden:

Q. Showing you now a collection of papers marked Respondents' Exhibit 14 for identification and relating also to a bidding on the Marshall Ford Dam project in September, 1937, will you give the facts regarding the bidding?

Mr. Leisure: May I have the date on that again, please?

The Witness: This one?

Mr. Leisure: Yes.

The Witness: This is No. 14. Bids opened September 9, 1937.

Mr. Leisure: If Your Honor please, that comes after the time at issue in this case, after the time that issue was drawn. It seems to me it is certainly not admissible at this time.

Examiner Norwood: You mean subsequent to the pleadings?

Mr. Leisure: Yes, subsequent to the date that issue was drawn.

318 Mr. Wooden: The question of continuity of the activity is a question in this case, not merely before the complaint was issued but it seems to me as well since, and I haven't any hesitation in offering, and we shall continue to offer, evidence which, in our opinion, affects the charges, or relates to the charges in the complaint subsequent to the time the complaint was issued.

Mr. Leisure: I am not speaking of when it was issued, I am speaking of the time the issue was drawn for the issues to be tried in this case.

Examiner Norwood: Even if it were outside of that time it would be some evidence as to the method employed at that time.

Mr. Leisure: Your Honor permits that subject to our objection and to your usual ruling?

Examiner Norwood: Yes, the objection will be overruled and you will have your exception.

The Witness: Respondents' No. 14 refers to bids opened at the Denver, Colorado, office on September 9,

1937, under Invitation No. 46988-B, covering 45,000 barrels of cement for the Marshall Ford Dam, Colorado River Project, Texas.

By Mr. Wooden:

Q. Was that the same project that we just dis-
319 cussed with regard to the low heat cement bids?

A. Yes.

Q. And how much difference in time?

A. June 21, 1937, and September 9, 1937.

Four bids were received: Lone Star Cement Corporation, Dallas, Texas, shipping from Houston, Texas; Republic Portland Cement Company, San Antonio, Texas, shipping from Longhorn, Texas; Universal Atlas Cement Company, Chicago, Illinois, shipping from Atco, Texas; Trinity Portland Cement Company, Dallas, Texas, shipping from Houston, Texas. There was one additional bid, making five in all. The fifth bid came from the W. F. & J. W. Barnes Lumber Company of Waco, Texas, shipping point Longhorn, Texas.

Q. That is the same shipping point as another mill, is it not?

A. The same shipping point as the Republic. The four cement companies submitted identical bids, $2.34 per barrel f. o. b. destination, shipment on Government bill of lading, and $2.33 per barrel f. o. b. destination, shipment on Government bill of lading.

Q. You mean you have them reversed?

A. $2.34 shipping on commercial and $2.33 shipping on Government bill of lading.

Q. Were f. o. b. mill bids asked for? Might I
320 ask you instead: To what extent it has been your general practice to ask for f. o. b. mill bids along with the destination?

A. It was our practice to ask for bids f. o. b. shipping point and/or destination. In this case we asked for delivery at shipping point and/or Rutledge, Texas, destination point.

Q. Have you finished with the bids? That lumber company, you did not give that.

A. Yes. The lumber company bid $2.49 per barrel f. o. b. Rutledge, Texas. These bids were all subject to a 10-cent per barrel discount.

The award was made to the Republic Portland Cement

Company of San Antonio, Texas, shipping from Longhorn, Texas.

Q. How was the award made, or on what grounds?

A. This letter from the First Assistant Secretary to the Commissioner of the Bureau of Reclamation indicates that the reason for award was the nearest mill, bearing in mind sifting cement from cars while in transit.

Q. Do you know whether that represents an exception to or a change in policy with regard to giving the business to the most distant mill when the bids were identical?

A. This apparently is the same policy applied in the first Colorado River project purchase of cement where the award was made to the Republic.

521 Q. Do you know any other cases where it has been made to the nearest mill?

A. Speaking of cement only?

Q. Yes.

A. I do not recall any others except those two cases.

Q. Was commercial freight deducted in this case?

A. Commercial freight was deducted to determine the amounts for comparison of bids.

322 Q. For any other purpose? Just explain your answer What do you mean by that?

A. Well, there were no land grant rates in Texas.

Q. I see. Was there any control clause involved in that case?

A. The papers do not indicate any control clause.

Q. If there were no land grant rates applicable, or no special rates, there would not be any need of it or any occasion for it?

A. No.

Mr. Wooden: I should like to have these papers marked for identification.

(The documents referred to were marked for identification "Respondents' Exhibit 15.")

By Mr. Wooden:

Q. Showing you the papers marked Respondents' Exhibit 15 for identification, and relating to bidding on the Parker Dam project in October, 1937, will you give us the facts on that as you did in the other case?

A. No. 15 covers specifications 977-D. Bids received at the office of the Bureau of Reclamation, Denver, Colorado, on October 13, 1937, for low heat Portland cement for the Parker Dam project, Arizona-California, in the

amount of 160,000 barrels. Bids were asked either on the basis of delivery f. o. b. cars at shipping point or f. o. b.
323 cars at Earp, California, at the option of the bidder.

Two bids were received,—one from the Monolith Portland Cement Company, Los Angeles, California, shipping point Monolith, California. The second bid was a joint bid of the Riverside Portland Cement Company, California Portland Cement Company, and Southwestern Portland Cement Company, all of Los Angeles, California, shipping from Cresmore and/or Crogrande and Victorville, California. This indicates that the two bids were alike, 1.49 per barrel f. o. b. shipping point.

Q. Did that work out to an identical delivered price?

A. Yes.

Q. Do you know whether the commercial and the land grant rate—is there a land grant rate involved there?

A. No. I believe there is a special rate involved there.

Q. I believe you said there was nothing in confidence about special rates. What is it?

A. The rate used here is .564.

Q. Used by all bidders?

A. Yes; applied to all bids.

Q. And giving an identical delivered price as well as identical f. o. b. mill price, is that right?

A. Yes.

Q. Now, referring to your specifications on this Parker Dam project, paragraph 8 entitled "Deliveries", will
324 you read down to the end of that red mark there (indicating)?

A. (Reading:) "Paragraph 8—Deliveries—The schedule is prepared so as to permit bids either on the basis of delivery f. o. b. cars at shipping point or f. o. b. cars at Earp, California, at the option of the bidder. On bids providing for delivery f. o. b. cars at shipping point, all material shall be shipped on Government bills of lading, and the cost of transportation from shipping point stated in the schedule to Earp, California, will be paid by the Government. Under bids providing for delivery f. o. b. cars at Earp, California, all material shall be shipped on commercial bill of lading, and the cost of transportation from the shipping point, which shipping point must be stated in the schedule, to Earp, California, shall be paid by the contractor and included in the unit prices bid in the schedule, provided that the Government reserves the

right to require shipment on Government bills of lading, in which case the Government will deduct from any payment to the contractor the cost of transportation from the shipping point stated in the schedule to Earp, California, of the total shipping weights at all-rail commercial freight rates, unless other rates are specified by the bidder."

Q. That language "unless otherwise specified by the bidder" is something new in your specifications, wasn't it?

A. It is not familiar, no.

325 Q. Your specification here in the Grand Coulee bidding in August, 1935, was the same as that, was it not, except for those words "unless otherwise specified by the bidder"?

A. Apparently so.

Q. I note that this specification provides that the Government reserves the right to deduct the commercial freight unless other rates are specified by the bidder. Was that change made in order to be in conformity with the Comptroller General's ruling in January, 1937?

A. I could not say as to that.

Q. Who would know about that in your department?

A. Probably someone in the legal department would have handled that matter.

Q. Let us go back for a moment to this Grand Coulee bid in August, 1935. Will you state just what the difference per barrel was in the destination price between the identical bidders and the one which was next above them? There is one bidder, isn't there, of 2.0192?

Examiner Norwood: What identification number has that schedule?

Mr. Wooden: This one was taken out and does not bear a separate number.

Mr. Leisure: Are not these papers kept together?

Mr. Wooden: Yes, but someone wanted to use this particular sheet and it was taken out.

326 The Witness: This is Specification No. 641 for the Columbia Basin project, Washington. The difference in the bid for Item 3 between the five Washington cement companies and the Pacific Portland Cement Company of San Francisco, is about 27 cents.

By Mr. Wooden:

Q. What is the difference between the identical bidders and the next one above them?

A. The difference is .0004 per barrel.

Q. Now, referring to this Respondents' Exhibit 5 for identification, comprising your invitation for bids on the Grand Coulee Dam in August, 1935, I note on page 19 of your specifications or of your invitation, the invitation for bids on clinker. Will you give us the facts regarding that invitation for clinker, and what bids you got on that?

Mr. Leisure: If he knows the facts; if he prepared the invitation. I do not want hearsay evidence here. If he knows of his own knowledge.

Examiner Norwood: He may answer from his own knowledge acquired directly or through these official actions.

The Witness: Under our specifications No. 641, we called for Portland cement and Portland cement clinker for Grand Coulee Dam, and Item 4 of Schedule 2 covers modified Portland cement clinker in bulk.

327 By Mr. Wooden:

Q. What quantity?

A. 650,000 tons. That is either delivery Odair or delivery shipping point.

Q. What is clinker used for?

A. The manufacture of cement.

Q. How many barrels would 650,000 tons make?

A. I have no idea.

Q. Did you get any bids on clinker?

A. Yes.

Q. Who bid and what?

A. The bids on clinker were, five companies bid $9.70. The Beaver Company bid $10.4856, and the Pacific Portland Cement, 11.0578.

Q. Is that per ton?

A. Yes.

Q. What was done with the bids on clinker?

A. No award was made for that item.

Q. Do you know why?

Mr. Leisure: Now, if the Court pleases, I do not think this witness can tell why awards were not made on clinker, and I object to that question.

By Mr. Wooden:

Q. Do you pass on all these bids and make recommendations as to what should be done with them?

328 A. I pass on the bids, but did not recommend any approval of any certain bids.

Q. Did you make any recommendation regarding the bids on clinker?

A. No. That was passed on by others than myself.

Q. Do you know who?

A. By the Department, acting on the Bureau's recommendation.

Q. Why did you ask for bids on clinker?

Mr. Leisure: That is objected to as being incompetent, immaterial and irrelevant. I might point out to Your Honor that the pleadings do not include the sale of clinker. The pleadings apply only to the sale of cement, so that my objection goes to that as not being an issue raised, as well.

Examiner Norwood: Clinker is mentioned in the pleadings, in the complaint here, as being a component.

Mr. Wooden: Clinker is described; how cement is made from clinker.

Examiner Norwood: I see no harm in his telling it as part of the picture. Objection overruled.

The Witness: The object in asking for bids on clinker—

Mr. Leisure (interrupting): May I ask just a question on the *voir dire* here?

329 Examiner Norwood: Yes.

Mr. Leisure: How did the knowledge come to you, the reasons for asking for bids on clinker? When did you first learn about that?

Mr. Wooden: Is there to be cross-examination at this time, Mr. Examiner?

Mr. Leisure: I just want to ask him on the *voir dire* to show that this witness is not a competent witness to answer the question.

Mr. Wooden: I think that his whole testimony shows that he is. His position in the Bureau and his experience and duties and function there bring it clearly within his knowledge and general jurisdiction.

Mr. Leisure: I think his answer will best tell that, if the Court please.

Examiner Norwood: Did he answer the question?

Mr. Leisure: No, he has not answered the question.

Examiner Norwood: He may answer then. Do you want the question read?

The Witness: Yes.

Examiner Norwood: Read the question.

(The question is read.)

Mr. Wooden: That is plain cross-examination, Your Honor.

330 Examiner Norwood: I want to get that answer.

Mr. Leisure: Perhaps I can simplify it. How did you know the reasons—

Examiner Norwood (interrupting): Just let him answer that question.

The Witness: These specifications are our Washington office specifications. They are prepared in Denver and approved by the Commission before they are issued, and they are issued by me to bidders as well as by the field officers, and all the correspondence connected with the case comes over my desk. Therefore I am familiar with the fact that we did ask for bids on clinker and the reasons for it.

Mr. Leisure: And does the file show the reason for it, the file which passes over your desk? The file which passes over your desk shows the reasons for asking for bids for clinker?

The Witness: Yes.

Mr. Leisure: I withdraw the objection.

Examiner Norwood: Now, read the previous question.

(The following question is read: "Why did you ask for bids on clinker?")

A. To determine the feasibility of establishing a cement processing plant at the Grand Coulee Dam.

331 Q. Just one or two questions and I think I am through with Mr. Taylor. Mr. Taylor, did you ever have any conversations with officials of any of the cement companies with regard to their method of quoting prices on a destination basis rather than f. o. b. mill?

A. Yes.

Q. With whom?

A. Well, several of the representatives come into the office at times and discuss various matters.

Q. Can you name some of them?

A. I do not recall names. I remember a representative of the Lone Star Company.

Q. Do you know whether has name was Neylan?

A. Mr. Neylan has been in. He is from New York City, I believe.

Q. Did you have any conversation with Mr. Neylan regarding the practice of making bids on destination basis?

Mr. Leisure: I object to leading the witness in this

way. He has not only suggested the name to the witness, but now he proceeds to testify, suggesting what the witness might have said to him.

Examiner Norwood: I do not think that leading would really influence this witness. He is an expert here.

Mr. Leisure: If the witness had any conversation
332 with the cement officials about the issues in these pleadings, he certainly should be able to tell us without the assistance of counsel for the Government, and he should tell us who they are and what the conversation was. That is the only way we can meet it.

Mr. Wooden: That is what I am seeking to do.

Examiner Norwood: Read the question.

(The question is read.)

Examiner Norwood: Objection overruled. Answer that yes or no.

The Witness: No; not that I remember.

By Mr. Wooden:

Q. Did you have any conversations with any other official of the cement company on the same subject?

A. I might say in answer to that question that these representatives talked over matters in general, they discussed the so-called basing point system, and this and that, and different invitations that we have, current invitations for bids on cement, and it is difficult for me to say just what that conversation was or whether they covered any certain points.

Q. Did you ever ask any of them why they would not quote on an f. o. b. mill or shipping point basis?

Mr. Leisure: The question is objected to, if Your Honor please.

Examiner Norwood: Objection overruled.

333 Mr. Zimmerman: May I suggest that it is objectionable and we do object because here is simply a story of some general conversations. It is impossible to make any check-up on them to determine what was said by any particular individual.

Examiner Norwood: He is trying to make it more specific. It appears to me he is trying to bring out evidence of an admission.

Mr. Zimmerman: But there has been no conspiracy proven here, and certainly we object that it is irrelevant and immaterial and absolutely incompetent. It could not

be binding upon our client, so far as the Marquette Cement Manufacturing Company is concerned, and we raise those objections.

Examiner Norwood: We settled that question for the time being. Objection overruled. Read the question.

(The question is read.)

Mr. Knapp: If Your Honor please, I would like to register a specific objection in behalf of the Universal Atlas, because anything that may be said or repeated here with regard to representatives of other companies could not in any way be binding upon the Universal Atlas Cement Company.

Examiner Norwood: Objection overruled.

The Witness: What is the question?

334 Examiner Norwood: We are receiving this on condition that connection be made, of course.

(The question is read.)

Mr. Leisure: I object to the question as being too general, unless the witness can fix who it was that he asked. Surely, we have the right to have the witness specify to what individuals he talked so that we can meet it.

Examiner Norwood: He may establish it universally, and then he can immediately go ahead and make it particular.

Mr. Leisure: Suppose he does not do that?

Examiner Norwood: The universal is negatived and there is no particular.

Mr. Zimmerman: We ought to have the time and the place, too, if Your Honor please.

Mr. Wooden: That is all a matter of details.

Examiner Norwood: It will all be brought out. This is a general question, did he ask anybody at any time.

Mr. Zimmerman: All of this testimony will be stricken out if he does not show specifically the time and the place and the person, and the connection with the defendants?

Examiner Norwood: Objection overruled, and I 335 will ask the witness to answer the question. I believe he can answer it by yes or no.

The Witness: I would rather answer it by saying that I can not state under oath any particular conversation that occurred between representatives of the cement companies and myself, because that is a very common occurrence, and we discussed many matters, and I can not state the exact topics of the various conversations.

By Mr. Wooden:

Q. I am asking you about one topic only, and that is have you discussed with them or asked of them why they made a practice of bidding destination rather than shipping point prices?

Mr. Leisure: I again object to the Government leading its own witness and suggesting whether or not he talked to certain individuals.

Examiner Norwood: Objection overruled. Answer the question.

The Witness: To the best of my recollection, that question was discussed as well as several others. I can not state though, with whom or when. I know where.

By Mr. Wooden:

Q. Can you say, Mr. Taylor, whether such conversations were with representatives of bidders who were bidding on projects before your Bureau?

336 A. Yes, sir.

Q. Did you get in your conversations with the various bidders on this subject, any understanding of why they followed the practice of bidding destination rather than at shipping point basis?

Mr. Leisure: The question is objected to as being incompetent, immaterial and irrelevant, and upon the further ground that the Government is leading its own witness.

Examiner Norwood: Objection sustained.

By Mr. Wooden:

Q. Did you at any time, Mr. Taylor, tell me what information you had gotten from bidders on that subject?

Mr. Leisure: Same objection, if the Court pleases. What this witness told the prosecutor about anything has not the slightest relevancy to any of the issues in this case.

Examiner Norwood: He wants to contradict the witness or lead him because of surprise. Is that the idea?

Mr. Wooden: Essentially the latter, Your Honor. I was led to believe that the witness would testify on this subject.

Examiner Norwood: He has already answered the question. Unless you want to contradict him, I do not see how you can pursue it any further.

337 Mr. Wooden: Your Honor, I do not suppose we are, in a proceeding of this sort of an administrative

body, going to be held to the strict technical rules of evidence regarding such matters. It is a question of getting at the facts, that is all.

Examiner Norwood: I do not think we should, but he has already said that he did not know, he did not have any particular knowledge on that subject.

Mr. Wooden: He has testified also that he had conversations with various bidders.

Examiner Norwood: But he did not know who or when.

Mr. Wooden: That's all right. That simply affects, possibly, the weight.

Examiner Norwood: We have to receive this evidence in fairness, and if he does not know who or when, how can the respondents reply to it or disprove it in any way?

Mr. Wooden: That only goes to the weight, Your Honor, in any event. The proposition is that this witness is a person in an official duty, and has had conversations with bidders who in the main are respondents in this proceeding. Now, whether or not he can remember what particular individual told him some particular thing or not, is simply a matter that affects the weight of his testimony and not its competency.

338 Examiner Norwood: I do not see how we can receive testimony that somebody told him something, sometime, unless we make it sufficiently definite to be applied and have some weight.

Is there a question pending?

(The pending question is read.)

Examiner Norwood: Objection sustained.

By Mr. Wooden:

Q. Do you mean to say now, Mr. Taylor, that you have no recollection of a conversation on that subject with representatives of the bidders on Bureau projects?

Mr. Leisure: That question has been answered, if the Court please. The witness has said that he has not and now he is proceeding to cross-examine him.

Examiner Norwood: He may ask that question. Objection overruled.

Mr. Leisure: Exception.

The Witness: What is the question?

(The question is read.)

A. I do not recall what actually took place in those conversations. That subject, among others, has been dis-

cussed at various times, with representatives of the cement companies.

By Mr. Wooden:

Q. Do I understand that you do not now remember any statement that was made by any bidders' representatives to you on that subject?

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Mr. Leisure: The same objection. The witness has already answered that same question. He said he did not, so this is trying to get him to reverse his previous testimony.

Examiner Norwood: Objection sustained.

Mr. Wooden: It is just a matter of clarifying the position and testimony of the witness. That is all. I am not trying to make him reverse himself; I am just trying to probe his memory; that is all.

The Witness: What is the question?

Mr. Leisure: It has been ruled upon.

Examiner Norwood: The objection is sustained.

Mr. Wooden: All right. No further questions.

Examiner Norwood: We will recess now until 1:45 o'clock.

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Mr. Little: Your Honor, as I have heretofore stated, I am representing the Superior Portland Cement, Inc., with its principal place of business in Seattle, and that company is approximately 2500 or more miles distant, and I had not intended when coming here, to stay during the whole of the hearings here, and talked to Mr. Wooden on the day of the opening hearing and suggested that at least on behalf of my company, and I thought the same thing should doubtless apply to other companies distant approximately that distance from the place of this hearing, and so I have individually agreed with Mr. Wooden, and other counsel representing rspondents who are also far distant, have agreed upon the form of a stipulation which I would like now to read into the record and have it understood that it applies to anything at this hearing.

Examiner Norwood: You have entered into that with Commission counsel?

Mr. Wooden: I have agreed to it informally. I will wait until it is read to see if it is in exact accord with my understanding.

341

Examiner Norwood: You may proceed to read the proposed stipulation.

Mr. Little: First, except as otherwise noted, it is agreed that when an objection is made to the admissibility of testimony or exhibits, or a motion is made by any respondent directed against any evidence already admitted, the same objection or motion will be deemed to have been made by each of the respondents.

That, in substance, I think was raised by one of the other counsel at the first day's hearing, and I think your Honor agreed to it.

Second, any respondent whose principal place of business is more than 2,000 miles distant from Washington, D. C. by present air lines, shall have the right of delayed cross examination of any witness at a time and place to be later arranged and before being required to proceed with its own defense, provided, however, that the usual witness' fees in such case shall be paid by such respondent, and provided notice of intention to so cross examine is given within fifteen days after the case of the government is closed.

Third, at any time prior to the offering of its defense testimony, if any, each respondent shall have the right to make such objections or motions directed to or
342 against any of the evidence theretofore introduced, in so far as it might or might not relate to that respondent, without prejudice, on account of any previous ruling thereon while respondents' counsel was not present.

Fourth, any respondent shall have the right at any stage of this proceeding to adopt any testimony offered by any other respondent or respondents without the necessity of any formal offers.

Fifth, each respondent hereby expressly reserves any and all objections heretofore made to the jurisdiction of the Federal Trade Commission.

Examiner Norwood: Is that agreeable to counsel for the Commission?

Mr. Wooden: Yes, that is agreeable to me.

Examiner Norwood: Is that agreeable to the other respondents? I understand it applies to them, too.

Mr. Clark: May it be understood that it applies without respondents specifically so stating, in other words, to have it apply for the benefit of the companies on the Pacific Coast without their specifically so stating.

Mr. Wooden: That was the purpose.

344 GEORGE T. LEMMON, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

345 *Direct Examination by Mr. Wooden.*

I am purchasing agent for the Department of Highways, Commonwealth of Virginia, with headquarters at Richmond, and I have held such position for a little over three years. Prior to that time I was assistant engineer in charge of highway construction for the Virginia Highway Department.

Q. Will you state in a general way just how the purchases of the State of Virginia for cement are made?

A. For the past two years, we have advertised for bids to be received on a specific date, and at that time opened them. Where we had low bids, the awards were made on the low bid. Where there was no low bid, the award was made to the company or companies having the highest strength test according to the reports of our Testing Department.

Q. What was the practice of your highway commission in the purchasing of cement, with regard to whether it buys specific quantities at a given time or a long term contract covering all of your requirements?

A. The purchasing department buys all cement for the maintenance and construction by state forces on a yearly contract, with no specific quantity, in carload lots.

Q. What do the total purchases of the State in that 346 manner amount to per year?

A. Approximately 30,000 barrels.

Q. What is that used for?

A. Used for repairing roads by the Maintenance Department and for the construction that is done by the State forces.

Q. Are there additional quantities of cement that are used for road construction purchased by contractors?

A. All cement for contract work is purchased by the contractor himself.

Q. And what do those requirements per year amount to, approximately?

A. I have no idea.

Q. Is it substantially larger than the 30,000 barrels which you mentioned as the term purchases?

A. I should think so, but I have no figures on that at all. It does not come through my department.

Q. In advertising for bids, do you specify where cement is to be delivered?

A. We ask for prices in carload lots at at least one railroad station in each county in the State that has a railroad, and in some counties we have a number of points in that county.

Q. Do I understand that your invitations to bid are issued to all concerns that sell cement, or only to mill companies?

A. Only to the mills.

347 Q. Are there mills located within the State of Virginia?

A. Yes, sir, there are two.

Q. Who owns them and where are they?

A. One is the Lone Star Cement at Norfolk and the other is the Lehigh Fordwick plant at Fordwick.

Q. What are the nearest mills outside the State of Virginia?

A. The only one that I know of is the Pennsylvania Dixie at Kingsport, Tennessee.

Q. Do you have bidders among mills covering a rather wide area? In other words, if you can, name a representative list of the bidders on your requirements and state where they are located?

A. On a bid received on June 20th, 1936 for our requirements from July 1, 1936 to June 30, 1937, there were bids from seventeen companies.

Mr. Leisure: May we have the document identified for the purposes of the record?

Mr. Wooden: I am going to give it a number myself. I ask to have this marked Commission's Exhibit 9 for identification.

(The document referred to was marked "Commission's Exhibit 9 for identification.")

By Mr. Wooden:

Q. You gained the names of the bidders on this
348 1936 and 1937 contract from the heading of a table, do you not, containing a tabulation of the bids?

A. That is a tabulation made by one of my clerks from the original bids submitted by those cement companies.

Q. And are the original bids attached to the tabulation?

A. They are.

Q. Was the tabulation made under your immediate and direct supervision?

A. Under my instructions, yes, sir.

Mr. Wooden: Your Honor, I would like to offer that for the record, with this understanding, that the tabulation itself will be checked with the original bids to which it is attached, and the original bids themselves returned to the witness when that has been done.

Mr. Leisure: Are you going to offer the invitations, too, Mr. Wooden? Is that your intention?

Mr. Wooden: No, I had not intended so to do. I am perfectly willing to have it done, but that was not my intention.

Mr. Leisure: If you will make them available to us, we may not want to put them in the record.

The Witness: The invitation is attached.

Mr. Leisure: They are attached?

The Witness: Yes.

349 Mr. Wooden: I did not know that.

Examiner Norwood: Is it agreed that they may withdraw those bids after checking with the tabulation there?

Mr. Leisure: Oh, yes; there is no objection to that.

The Witness: That is our only record.

Mr. Leisure: After we have had a chance to see the bids.

Mr. Wooden: The bids are attached.

(COM. EX. 9-A, 9-B, and 9-C was offered and received in evidence.)

By Mr. Wooden:

Q. Now, just calling your attention, Mr. Lemmon, to the first entry, delivery point, Parksley, Accomac County, will you state what the bids were for those seventeen companies?

Examiner Norwood: Off the record.

(Discussion off the record.)

The Witness: Allentown Portland Cement Company, Parksley, $2.34 a barrel.

Alpha Portland Cement Company, $2.34.

Edison Cement Corporation, $2.34.

Giant Portland Cement Company, $2.34.
350 Hercules Portland Cement Corporation, $2.34.
Keystone Portland Cement Company, $2.34.
Lehigh Portland Cement Company, $2.34.
Lone Star Cement Corporation, $2.34.
Medusa Portland Cement Company, $2.34.
Nazareth Portland Cement Company, $2.34.
North American Cement Corporation, $2.34.
Penn Dixie Cement Corporation, $2.34.
Standard Lime & Stone Company, $2.34.
Universal Atlas Cement Company, $2.34.
Volunteer Portland Cement Company, $2.34.
Vulcanite Portland Cement Company, $2.34.
Whitehall Cement Company, $2.34.

358 Q. Mr. Lemmon, do you have another set of bids for another year?

A. Yes.

359 The witness identified Com. Ex. 10-A, B, C, and D as a tabulation of some bids received June 25, 1937, and attached thereto are the original bids from which the tabulation was compiled. That tabulation was compiled by the same person in the same way as the preceeding one.

Mr. Wooden: I will offer that for the record, your Honor, subject to the same conditions as the previous one was offered, namely, that the tabulation itself be subject to check with the basic data attached to it, and when that is done, that the basic data itself be returned to the witness.

Mr. Leisure: After we have had the opportunity to review the basic data.

Mr. Wooden: Yes.

360 (COM. EX. 10-A to D inclusive was received in evidence.)

Q. Now, just take one at random here, Mr. Lemmon, and state what the bid was, state the delivery point and the name of the bidders?

A. Well I will take Martinsville, Henry County.
Alpha Portland Cement Company, $2.42.
Giant Portland Cement Company, $2.43.
Hercules Portland Cement Company, $2.43.
Lawrence Portland Cement Company, $2.43.
Lehigh Portland Cement Company, $2.42.
Lone Star Cement Company, $2.43.
Medusa Portland Cement Company, $2.42.

North American Cement Corporation, $2.42.
Pennsylvania Dixie Cement Corporation, $2.42.
Standard Lime & Stone Company, $2.43.
Universal Atlas Cement Company, $2.43.
Volunteer Portland Cement Company, $2.42.
Vulcanite Portland Cement Company, $2.43.
Whitehall Cement Company, $2.42.

361 Q. Does it so happen that you picked out the one on that whole page that contains the deviations?

A. That was unintentional and I did not realize it until I struck the different price. It was unintentional.

Q. But it is a fact?

A. It is a fact.

Q. The only other deviation on the page is the one at the bottom of the page?

A. That is the only one.

Q. Did you have any conversations with any bidder on that contract with regard to those deviations?

A. I do not recall.

Q. Do you have still another year's compilations?

A. That is the only one taken of the bid—the only two taken of the bids.

Q. What other commodities do you purchase for the State of Virginia?

A. Everything that is used by the highway department.

Q. Name some of the principal commodities.

A. Steel of all kinds, structural, reinforcing, rail steel; calcium chloride, stone, gravel, sand, asphalt, tar, coal, explosives, trucks, automobiles, power shovels, tractors.

Q. Do you advertise for bids on all these commodities?

A. We advertise for publicly opened bids on all purchases that it is possible to do so.

362 Q. Do you find identity of delivered prices on all other bids like you do in cement?

A. Some of them, yes, sir.

Mr. Leisure: Just a minute.

The Witness: Excuse me.

Mr. Leisure: That is objected to, if the Court please, as being incompetent, irrelevant and immaterial, what others do, whether others have similar complaints to file or whether they have not has nothing to do with the issues in this case.

Examiner Norwood: Objection overruled. You are

confining your answer to your experience in this purchasing department in the State of Virginia?

The Witness: I think I answered the question.

Exainmer Norwood: Read the answer.

(The answer was read by the reporter.)

By Mr. Wooden:

Q. And some of them not?

A. The majority of them not.

Q. All right. What are some of the commodities that fall in that majority?

A. Power shovels, trucks, structural steel, reinforcing steel, coal, explosives, automobiles, tractors.

Q. What is your purpose in advertising for bids on various commodities?

363 A. Competition.

Q. Are you required by law to do it?

A. No, sir.

Q. It is just a matter of your own policy, is that right?

A. The policy of the Commission.

Q. Do you consider, as the purchasing agent, that you are getting the benefit of competition on these identical bids?

Mr. Leisure: That is objected to as incompetent, irrelevant and immaterial, what this witness considers.

Examiner Norwood: Read the question.

(The question was read.)

Mr. Leisure: That is a matter that is to be argued later in this case, if the Court please.

Examiner Norwood: Competition is a matter of fact. If that question means do you consider you are getting it—read the question again.

(The question was read.)

Examiner Norwood: Objection overruled.

A. I do not.

By Mr. Wooden:

Q. Will you state why not?

Mr. Leisure: The same objection.

Examiner Norwood: Objection overruled.

A. I do not see where there can be any competition where the majority of the prices are the same.

364 By Mr. Wooden:

Q. Does your experience on other commodities have anything to do with that?

A. Yes.

Q. Do you take into consideration the varying location of the mills?

A. Yes.

Q. In other words, I take it you get no different prices ordinarily from a mill in the State of Virginia than you would from mills that are far distant?

A. There are a very few instances where there is any difference.

Q. Where there is or is not?

A. Where there is any difference.

Q. I just want to make sure that this Exhibit 10-A, B and C is identified as the bids received June 25, 1937, for the State requirements for the year ending June, 1938, is that correct?

A. June 30, 1938.

Mr. Wooden: Yes, sir. You may take the witness.

Examiner Norwood: You may examine him.

Cross-Examination by Mr. Leisure.

Q. Mr. Lemmon, when you were testifying as to these identical prices in both of the sheets, that was the 365 commercial price also, was it not?

A. I do not know.

Q. Don't you know that the Government was getting the same rate that the commercial price was made at that time?

A. No, sir.

Q. Now when you said that there was competition, that the advertisements were made for competition, you meant by that to get the lowest bid, did you not?

A. Yes, sir, the lowest bid for the articles meeting our requirements.

Q. So that what you meant by wanting to get competition, you were interested in getting the lowest price to you?

A. The lowest price on the article meeting our requirements.

Q. Now I believe you said you did not see how there could be competition if the prices were all the same. Do you think there is competition between cigarette manufacturers, for instance?

A. I do not know.

Q. If the prices should be similar and identical in the same market what would you think about it?

A. I do not know.

Q. Well, let us suppose that two drug stores have ice cream sodas and they are both selling at 10 cents apiece, do you think there is a lack of competition merely

366 because they are both selling at the same price?

A. I do not know whether it is or not.

Q. Now you said the majority of things that you purchased were not on identical bids. There are a great many that are on identical bids, aren't there?

A. At the present time I can only recall three.

Q. What about school equipment? Do you have occasion to buy that?

A. No, sir.

Q. Typewriters.

A. We buy typewriters, yes, sir.

Q. What about them?

A. Their price is the same.

Q. What about school desks and school chairs?

A. I do not buy them.

Q. Auditorium seats?

A. No, sir.

Q. You do not buy them?

A. No, sir.

Q. Padlocks?

A. Yes, sir.

Q. Are they identical?

A. No, sir.

Q. They are not?

A. No, sir.

367 Q. Are you sure of that?

A. The ones we buy, we always get a low bid on them.

Q. What about hospital equipment?

A. Do not buy any.

Q. Fire extinguishers?

A. Only occasionally, and I do not recall the prices on them.

Q. What about operating room equipment?

A. Do not buy any.

Q. Kitchen equipment?

A. No, sir.

Q. You mean by that that you do not buy it?

A. We do not buy it.

Q. How about glassware and glazing?

A. Do not buy any, other than automobile windshields and glasses. That is generally bought locally from a local dealer.

Q. What about steel tanks, do you buy those?

A. A few occasionally.

Q. Are the bids identical?

A. Sometimes they are and sometimes they are not.

Q. What about steel sheet piling?

A. Do not buy them.

Q. Reinforced steel?

A. They are not the same.

368 Q. They are not identical?

A. No, sir.

Q. Are you sure?

A. Yes, sir. Not always; occasionally you find a tie bid.

Mr. Leisure: That is all.

Redirect Examination by Mr. Wooden.

Q. You said that you can only recall three other commodities on which the bidding was generally identical. What are those three?

A. Calcium chloride was one; steel is another—I do not recall what the other one was now.

Q. Was it any form of steel?

A. Drill steel is usually the same price.

Q. Now in your purchase of reinforcing steel, have you bought anything other than straight bars?

A. Practically all of our reinforcing steel is bent to some plan.

Q. Do you buy it from jobbers?

We have a number of steel people on our list to whom we send those invitations. I can not recall them all now.

Q. You do not know whether they are jobbers or producers?

A. Some are jobbers and some of them buy their steel and bend it themselves.

Q. In other words, some fabrication is required in 369 connection with the purchase, is that right?

A. I could not say positively.

Mr. Wooden: All right, that is all.

Recross Examination by Mr. Leisure.

Q. Mr. Lemmon, it is a fact, is it not, that on standard products you get identical bids? Salt is the same, cement is the same kind of a standard product; where the products are the same you get identical bids, is that not so?

A. I would not say so.

Q. Is not that so?

A. Not to my knowledge.

Q. Give me an exception.

A. Well, I would say ton and a half trucks are not the same.

Q. Trucks are not the same. I am talking about standard products like salt, sugar, cement.

A. I do not know. It is very hard to determine what a standard product is.

Q. I think that is where our real difficulty is. You do not understand my question.

Examiner Norwood: Do you always get the same bid on salt?

The Witness: This salt, Your Honor, that is in carload lots. That is not table salt, that is mine salt for use for melting ice.

370 Examiner Norwood: How many bids did you get on it?

The Witness: I think there were five: I am not sure.

Examiner Norwood: And the five bids were identical?

The Witness: Yes, sir.

By Mr. Leisure:

Q. What is your final answer as to your bids on standard products? You do not know for sure?

A. I do not know.

Q. You do not know what you would classify as standard products?

A. I do not know what I would classify as standard products.

Mr. Leisure: That is all.

By Mr. Wooden:

Q. If cement is a standard product why do you award bids on the basis of strength tests?

A. If we have got to pay the same price for it there is no reason why we should not have the best.

Q. Do you find a difference in the strength of the different cements?

A. According to the reports made to me by the testing engineer, yes.

Q. Then cement, to that extent, is not a standard product?

A. I do not know that.

371 W. Z. BETTS, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

372 I am purchasing agent for the State Highway and Public Works Commission in the State of North Carolina, located at Raleigh, and I have held that position since October 1, 1933. I personally handle the matter of purchasing cement for the highway commission.

Q. Will you state in a general way just how you go about it?

A. We contract for our annual requirements for cement and we advertise for bids once each year for our entire requirements, make an estimate of about what that would be, and in advertising for these bids, after they are received, why, we award to some eight to twelve companies who are able to serve North Carolina in a satisfactory way.

Q. Do you figure on having the cement delivered throughout the State in various counties where it may be most conveniently used?

A. We call for bids on a delivered price basis and cement is delivered freight prepaid to destination throughout North Carolina.

Q. How many delivery points do you have bids submitted on?

A. Well, I guess there are possibly a thousand delivery points in North Carolina and they are filed on railroad stations, and the various cement companies bid on a
373 large number of them, and even delivered prices for various points throughout the State, and they pick, oh, I would say very nearly every point in North Carolina and quote at each point the delivered price.

Q. You do not confine yourself to asking for delivery, say, at the county seat in each case?

A. No, we haven't specified that in our bids. We

formerly called for bids at the basing points and we did receive bids just at the basing points, but in recent years the cement companies changed to making the bids to delivered points rather than on a basing point basis.

Q. When did that change take place?

A. Prior to 1934. I did not bring all my files up here. I only brought 1934 up, and 1934 files show that they were bidding on a delivered price basis, and I do not remember the exact year that they started that.

Q. When you refer to former bids on a basing point basis, do you mean bidding f. o. b. mill or what?

A. We just asked the cement companies to bid at how much they would furnish cement at the various mills and basing points that would affect North Carolina.

Q. Were you familiar with the basing points that affect North Carolina?

A. Yes, sir.

Q. How did you become familiar with them?

374 A. The cement companies furnished them to us in the bidding, furnished those basing points to us.

Q. Were there some mills during that period that were recognized as not being basing points?

A. Yes, sir. We would call for bids on some mills that did not make the cement in North Carolina, and the reason we bid that way was because at some future date the basing point price might go down and affect North Carolina, because when it did we would want it in our contract so it would affect our delivered prices.

Q. During that period did you have some mills then that quoted on a basing point basis other than where their mills were located?

A. Yes, sir, they did do that, yes, sir.

Q. Can you name any of those?

A. Any of the mills that did that?

Q. Yes.

A. The Pennsylvania-Dixie Cement Corporation, National Cement Corporation, Lehigh, Atlas, most all of them that serve this territory in North Carolina, Lone Star.

Q. To make sure we understand each other, those mills that you have named quoted prices on a basing point basis other than where their own mills were located?

A. Yes, sir.

Q. Are you buying from those same mills now?

375 A. Yes, sir.

Q. Are there any others than the ones you named?

A. We have contracts with 12 companies now that we are doing business with.

Q. About how much cement is bought under your direction in the course of a year?

A. In 1935 we bought 210,403 barrels; in 1936 we bought 336,031 barrels; the first ten months of 1937 we bought 365,604 barrels.

Q. What is that used for?

A. For building roads in the State of North Carolina. Some of it is used in some small building work that the State does, we do buy cement for that, but I would say 98 per cent of it is used in road construction.

Q. Are any of the needs of North Carolina for cement supplied through contractors?

A. We buy all the cement in North Carolina and furnish it to the contractors.

Q. Do you have here the bids that were filed on State requirements for the year 1936?

A. Yes, sir.

Q. You do not have a tabulation of these bids with you?

A. No, sir, I do not bother about tabulating them. They are all the same, so—

376 The witness identified Com. Ex 11 as a folder containing the original bids of North Carolina for the year 1936.

Mr. Wooden: Your Honor, I should like the privilege of preparing a tabulation based upon these bids, of course with the privilege of respondents to examine the basic material, and after which the tabulation may be substituted for the original material and the latter returned to the witness.

Mr. Leisure: Subject to checking the tabulation as to correctness we have no objection.

Examiner Norwood: Then you offer that?

Mr. Wooden: Yes.

Examiner Norwood: The North Carolina bids are received as Commission's Exhibit 11, to be withdrawn and a tabulation to be substituted as stipulated.

377 By Mr. Wooden:

Q. Can you state from those papers, the original papers, what variations there were at any given delivery point?

A. You mean if there were any variations in the delivered prices?

Q. Yes.

A. I haven't gone through this in detail, but in just casually going over this, since I have been up here, there may be an instance in here where some error was made, in which case we were asked to correct the price.

Q. Well, other than that can you say, or will you say that the prices at each given delivery point were the same?

A. By going through this file and making a tabulation to find out if there were any differences—I haven't gone over it except to just casually glance at this. I could not say, unless I went over it very carefully to say whether they are.

Q. Is that your general opinion or conclusion?

A. That is my general knowledge, yes.

Q. Having gone over those things?

A. Yes.

Q. Do you have in your hand one instance of the Lone Star Company's bid at Boone?

A. That is in another file.

380 By Mr. Wooden:

Q. Now referring to this Exhibit No. 12, do you find there a bid from the Lone Star Cement Company?

A. Yes, sir.

Q. What was its bid?

A. What was the bid?

Q. Yes, at Boone, delivered at Boone, North Carolina?

A. What was the bid delivered at Boone?

Q. Yes.

A. In this bid for delivery at Boone the price of the Lone Star cement per barrel in cloth was bid at $2.78.

Q. How did that compare with other bids at that point by other mills?

A. Here is the bid submitted by the Lehigh Portland Cement Company of Allentown, Pennsylvania, bidding in Boone, in Wautauga County, at $2.70 per barrel, cloth.

Q. Do you take that to be the bid of the other companies at that same point?

A. Yes, sir, I should think so. I can examine the others if you want me to.

Q. Not if the tabulation will show it.

381 A. Yes.

Q. I just want to get your general knowledge based upon your familiarity with those papers.

A. Yes.

Q. Do I understand that the Lone Star at Boone bid $2.78?

A. Yes.

Q. And the other companies $2.70?

A. I presume that they are all $2.70, although I haven't examined them.

Q. Did the Lone Star retain its price of $2.78 at Boone?

A. No, sir.

Q. It did?

A. No, sir.

Q. What did it do?

A. They wrote me a letter asking me to correct the price at Boone.

Q. To what?

A. To $2.70.

Q. The same as the other companies?

A. Yes, sir.

Q. What has been the policy followed by you in making awards to companies when they submit these identical delivered prices?

A. Well, there have been in the past years of from eight to twelve companies who could satisfactorily
382 serve North Carolina, and we have been more or less dividing the business between those companies.

Q. On what basis was the division made?

A. Well, we make a contract, say, for 50,000 barrels of cement with each company, and as we build roads we award certain projects to various cement companies and we try to give those projects to those cement companies located nearest the projects. We do that in an effort to cooperate with the cement companies as well as the contractors, so that they will get the greatest net back to the mill. We believe in the long run we have got to pay the bill. If we can help the cement companies get the greatest net why, some day, they might reduce the price.

And then again the contractor always wants cement from the nearest mill in order to obtain the best service. In other words, if the contractor is building a project and he is using two cars of cement a day, if he is getting

his cement from a mill that takes five days in transit and if starts to rain he has got ten cars of cement on the road, and that is a lot of cement. If he is located close to a mill that is, oh, I would say one day away, and he is using two cars of cement a day and it starts to rain and rains for two weeks he hasn't got but two cars of cement on his hands.

Q. I understand then that you divide the business with them?

A. Yes, among eight to twelve mills.

383 Q. You would not do that, would you, if you would get different delivered prices from different mills?

A. What do you mean by "different delivered prices"? You mean if we could get a lower price?

Q. At the different destinations, or at a given destination, if different mills made a different price to different destinations.

A. Why, we would naturally award the business to that cement company that might make the lower price.

Q. In other words, you would not divide it equally among the bidders?

A. No, sir.

Q. In other words, that policy is based upon your experience in finding that the bids are identical?

A. Yes.

Q. At delivered destinations?

A. Yes, sir.

Q. Will you give the names of the cement mills with whom you now have contracts?

A. We have contracts now with the Alpha Portland Cement Company, Lehigh, Lone Star Cement Corporation, Medusa Portland Cement Company, National Cement Company, Pennsylvania-Dixie Cement Corporation, Signal Mountain Portland Cement Company, Universal Atlas Cement Company, Volunteer Portland Cement Company.

384 Mr. Wooden: You may take the witness.

Cross-Examination by Mr. Leisure.

Q. Mr. Betts, when you first started to testify you spoke of the basing point system prior to 1934.

A. Yes, sir.

Q. Won't you tell us again what your experience was

as to that? I did not understand what your experience was.

A. What our experience was?

Q. Yes.

A. Well, in making a contract—

Q. (Interrupting.) Just a moment. What was your position prior to that time, prior to 1934?

A. Purchasing agent. You mean what was my position?

Q. Yes.

A. Purchasing agent of the State Highway and Public Works Commission.

Q. And that was over what period of time, please?

A. Since 1923, October 1.

Q. Will you just go ahead and explain it?

A. Well, as I said, we contract for our annual requirements of cement and we have to have some basis on which to buy cement. There is always a basis on which you have to buy something. If you buy cotton you have got to have some basis on which to buy it. Naturally we
385 have got to have some sort of basis on which to buy cement. Now we do not know, at the beginning of any year, that is the cement year, whatever time that may be, as to where we are going to use this cement, how much we are going to use and when we are going to use it. If we did we could just sit up and say, "We need so many barrels at Podunk, so many barrels at Chittling Switch, so many barrels somewhere else," but we just do not know that, so we set this basis up of calling for bids, asking the cement companies what is the price at their mill, and the cement companies bid the price at their mill, and naturally there are a lot of cement mills and the basis on which cement is being sold at any particular point is the lowest combination of any basing point plus the freight rate. So we just ask the cement companies' price at the mill and they agree to sell it at their mill price. And we have a traffic manager. If I want to know the price of cement at any time I just ask my traffic manager what it is. He knows what the price is at the various mills. He then figures the freight rate at all these mills and then works out the lowest combination freight plus base price and that makes the price of cement at that particular point.

Q. Is that the manner in which you asked for quotations when you asked for them?

A. Yes, sir.

Q. And you asked for mill prices, did you?

386 A. Yes, we asked for them.

Q. And in getting the mill prices did you think you were getting a basing point price also?

A. Yes. We had to establish some basis on which to buy this cement, and that was the simplest way, instead of having all these thousand points throughout the State of North Carolina we would just have six or eight. We try to simplify this thing, you know.

Examiner Norwood: Do you try to get them to sell you f. o. b. mill?

The Witness: No, we do not buy f. o. b. mill. We ask them to give us delivered prices, freight to be prepaid. That is the basis on which we buy cement, but in asking them to bid, in these requests for bids we asked them to prepay the freight, which they do for us in all instances.

By Mr. Leisure:

Q. I merely want to get clear in my mind what you mean by basing price. You mean you asked for a quotation at the mill price and that is what you got, is that what you mean?

A. Yes.

Q. Now when Mr. Wooden asked you a moment ago whether or not you would have distributed the business among various companies if the price had not been the same, you were interested in getting the lowest cost

387 price to you, were you not?

A. Sure.

Q. So that if one mill made the lowest cost price to you you gave it to that mill, is that right?

A. Will you ask that question again, please?

Q. If one mill made the lowest cost price to you that is the bid you would accept?

A. If they had done that, yes.

Q. If they had?

A. If they had done that, yes.

Q. But when a group of them made the lowest cost price to you you attempted to distribute the business among all of them, among all of those who were quoting the same low price, is not that so?

A. That is right, yes, sir. I would not call them low prices or I would not call them high prices, but the prices that were made. I do not know what it costs to manufac-

ture cement, I could not say whether it is low or high, either one.

Mr. Leisure: That is all.

Redirect Examination by Mr. Wooden.

Q. As I understand it, Mr. Betts, you no longer get those basing point prices?

A. No, sir, not now.

388 Q. And at the time you did get them, which I understood was prior to the code, is that correct?

A. I would not say prior to the code. Prior to 1934. I do not remember the year. If I had my file here I could give it to you.

Q. Prior to 1934?

A. Yes.

Mr. Leisure: If Your Honor please, I object to the question on basing point prices because he is now using the language which the witness in my cross-examination said was the mill price.

Mr. Wooden: The witness certainly testified to basing point prices on his direct examination. Perhaps you did not use that term.

The Witness: This is to simplify this thing. On these requests—

Examiner Norwood (interrupting): I will overrule that objection. Go ahead.

By Mr. Wooden:

Q. What is your answer?

A. The way it is in the bid, "Base price is bid February 8, 1934." You can call them whatever you want to. That is what we asked for in that bid.

Examiner Norwood: I thought he might explain as to what he meant by that term.

389 By Mr. Wooden:

Q. Well, when you got those base prices, whatever time or period it was that you got them, did you then make your own calculation of the delivered prices by adding the freight to those base prices?

A. Sometimes we would make our own calculations on various highway lettings that we would have, and at other times we would write to the cement companies and ask them to give us prices, I mean to make them up for us, help us.

They have got traffic departments, and of course we have got some too, but we very often get them to check us on it. Freight rates are rather complicated things.

Q. Did the cement companies at that time furnish you with any freight compilations for your use?

A. We have received from the cement companies what is known as a cement tariff, which shows the freight rate from the various mills that serve North Carolina.

Q. Did that compilation show it in terms of per hundred-weight or in terms of barrels?

A. I do believe I have seen both. I am not certain of that, I could not answer that definitely.

Q. Did it contain a conversion table by which the hundred-weight rate could be turned into barrels?

A. I believe that it did.

Mr. Wooden: That is all.

390 *Recross Examination by Mr. Leisure.*

Q. Prior to 1934, although the requests may have been for the base, you got delivered prices, did you not? These base prices were even prior to 1934?

A. At one time we did get these filled in (indicating) but just exactly what year I cannot say.

Q. Can you give me the name of any company or any year that those prices were filled in?

A. You mean give you any particular year?

Q. Yes, because my information is that you did not, and I want to be able to follow up your testimony and find out whether you received those.

A. I am certain that at some period we did receive these prices filled in. In fact I know that we did, from all these companies.

Q. Will you make available—I do not want to ask you to come back here—will you make available to our man your records showing those facts?

A. I will be glad to send a complete file for the year on that.

Mr. Leisure: Very good. That is all.

Mr. Wooden: Your Honor, don't you think it would be better if that request were directed to you so that it may be made available to the record rather than avail-
391 able to the respondents' representatives?

Examiner Norwood: Well, that is a request that

the respondents' counsel makes of the witness and he agreed to it. Now Commission's counsel can make another request if he wants to.

Mr. Leisure: You can subpoena them if you want to.

Mr. Wooden: We can subpoena them for the record?

Mr. Leisure: You have got the same privilege of examining it as we have.

Examiner Norwood: I consider it a private agreement between this witness and this attorney.

Mr. Wooden: If it is all right with the witness I have no objection to it.

The Witness: Well now, I can not settle this argument. I am willing to make them available and you all decide as to what you will do with them.

Mr. Wooden: Let them be made available for both sides.

Examiner Norwood: Will you send the same papers, or copies to the Commission's counsel that you will send to the other counsel?

The Witness: Well, that is a right big volume, just like this (indicating). I will let you all make the copies. I will send them to somebody.

Examiner Norwood: I think the respondents' coun-
392 sel will agree to show it to the Commission's counsel after he has examined it.

Mr. Leisure: Indeed I will.

Examiner Norwood: That settles it.

Mr. Wooden: Just one further thing.

By Mr. Wooden:

Q. I am showing you what appears to be a contract form dated January 29, 1934. It contains at the bottom the words "Base prices bid February 8, 1934". Then there is a list of towns. What was the source of your information as to those towns with reference to what you had on the heading, "Base prices"?

Mr. Zimmerman: That has been marked for identification, has it not?

Mr. Wooden: No.

Examiner Norwood: He can mark it later.

Mr. Zimmerman: It is a part of the file that has been offered?

The Witness: Yes.

Examiner Norwood: I see.

Mr. Wooden: The witness says that the same thing is in one of the files that is already in evidence. I did not know that.

Examiner Norwood: Yes.

By Mr. Wooden:

393 Q. I was interested in this because I understood that it was up to this time in 1934 that you got quotations to fill in those blanks there (indicating).

A. I continued to ask for these base prices even last year, but knowing possibly that the cement companies had a new method of making prices they would delete this and give me a list of delivered prices through North Carolina, but this same thing is in this other file exactly.

Mr. Wooden: You will not need that, I am sure.

Mr. Zimmerman: Let me see it.

Mr. Wooden: I have nothing further.

By Mr. Zimmerman:

Q. Those are all just blanks that are to be filled in?

A. Yes, the blanks are to be filled in.

Q. That is in all the forms?

A. Yes, sir, they are just the same thing.

By Mr. Wooden:

Q. I believe your testimony was that prior to 1934 you got those blanks filled in.

A. I do not know whether it was prior—it was prior to 1934 but I will not name the exact year, because I have not my files with me.

By Mr. Leisure:

Q. Mr. Betts, assuming you got them that way, did you ever sell— .

394 A. (Interrupting.) Did I ever do what?

Q. Did you ever buy,—excuse me,—on that basis?

A. I have got those invoices. We bought on that basis.

Q. Were not your bills of lading always invoiced destinations, as far back as you remember?

A. Yes, sir, absolutely.

Q. Then how do you explain the two?

A. We bought cement and signed the contract with these base prices in them, but the cement company shipping us cement invoiced us delivered price and we paid them on that basis.

Q. How do you know that these base prices were in there?

A. Were in where? In the bid?
Q. Yes.
A. Well, I can read, and they were there, that is how I know they were there.
Q. What is that?
A. I say I can read.
Q. You haven't brought your records here but you are telling me about some record.
A. They were in the bids by the cement companies. You asked me about the records and I haven't got the records, I admitted that a long time ago. I haven't got it.
Examiner Norwood: Is that all, gentlemen?
Mr. Leisure: Yes.
Witness excused.)

395 ARTHUR COLEGROVE, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am the secretary of the Department of Property and Supplies, Harrisburg, for the Commonwealth of Pennsylvania, and have occupied that position since January 15, 1935. My department has a lot of varied duties including practically all purchases for the commonwealth. We have a special highway purchasing section in our department which is under my supervision.

Q. To what do the purchases of that department amount in cement per year?

396 A. Well, in Pennsylvania, in the matter of road construction, the contractors buy their materials directly, subject to the Highway Department inspection, and the materials which we purchase are more for maintenance on repairs, and smaller construction. Our cement purchases have run as low as 15,000 or 20,000 barrels a year, and I think this year around 50,000 or 55,000 barrels. That is for maintenance. That is for the work the department's own forces do as against the work that is done under contracts.

Q. Can you give us any idea of the amount of cement that is handled through contractors and bought by contractors for state construction?

A. Oh, it is hundreds of times that amount. All of the major construction jobs are done under contract.

Q. Do you inspect the bids that contractors receive on various commodities?

A. No, sir.

Q. In other words, your only inspection then is confined to the purchases of cement that you make direct?

A. Yes, sir.

Q. From whom in general are such purchases made? Are they made first, from mills, or dealers?

A. I would say that 95 percent is from the mills themselves bidding direct.

Q. How many mills do you purchase cement from in the course of a year?

397 A. We probably get from 15 to 30 or more proposals on each offer, and in making the awards, I presume I have used from 12 to 15 or more different companies.

Q. Do you have under your personal control the matter of the making of awards?

A. Under the law, the Administrative Code of Pennsylvania requires the award to the lowest responsible bidder, but in the cement industry, there is no competition as to price—

Mr. Leisure: (Interposing) Now, if the Court please, I move to strike that out. This witness is not the Commission or the judge in this case. He can state what the facts are, but he cannot state what his opinion is as to whether there is competition in price.

Mr. Wooden: Your Honor, we have had that question up before, and the ruling has been that it is a matter of fact. We have a witness here who in the capacity of a purchasing agent, is on the receiving end of that proposition as to price, and if he cannot tell what the situation is there, nobody can. He is the very best kind of a witness on that point.

Examiner Norwood: I will ask the witness. Are you making that statement solely with regard to the purchases that you have made and the transactions that you have entered into?

The Witness: I am making that statement as it
398 refers to the purchases made for the Commonwealth of Pennsylvania by my department, and also based

upon the information supplied to me by the direct factory representatives of several of these mills.

Examiner Norwood: Objections overruled.

Mr. Leisure: May I make a motion to have the answer stricken out on the ground that it is not responsive, and that it is a conclusion of the witness on issues which are not before him to decide.

Examiner Norwood: I think, gentlemen, we have gone on the idea that competition is a matter of fact, and counsel for the respondents may cross examine and find out further bases for his statements.

Mr. Leisure: He can state the facts as to whether he gets identical prices or not. Your Honor, he cannot go further and say that, having gotten identical prices, therefore there is no competition. That he cannot do. He is not qualified to give that answer.

Examiner Norwood: Well, the ruling has been made on that and it will stand.

Mr. Zimmerman: Certainly it cannot be binding upon any company respondent here for a witness to simply state that he had been told this or that by representatives of companies. We have got the same question cropping up again that cropped up a while ago. If he can tell us
399 the time and the place and the name and who was present, we would have some fair opportunity for investigation and for fair cross examination.

Examiner Norwood: You can cross examine him on that. I have already ruled on it.

By Mr. Wooden:

Q. Mr. Colegrove—

A. (Interposing) I did not finish my answer when I was stopped.

Q. All right; finish your answer.

Examiner Norwood: You answered already.

The Witness: No. He asked me what was the manner of making awards in our State.

Examiner Norwood: Just wait until he asks you a question.

By Mr. Wooden:

Q. When you say there is no competition as to price in cement, did you base that upon your experience in getting identical bids?

A. Repeatedly and repeatedly.

Q. You also mentioned something about statements made to you by representatives of cement companies.

A. I talked with several of them.

Mr. Leisure: Now, just a minute, if your Honor pleases. Mr. Wooden knows perfectly well that a question of
400 that kind should be addressed to the witness by asking him who he talked to, so that we have the proper opportunity to object. These defendants cannot be bound by general questions and general answers.

Examiner Norwood: I think he is proceeding to identify some of these sellers of cement, and if he does, then the statements would be proper, otherwise they are not proper. Objection overruled.

Mr. Wooden: Just give me a chance and I will come to it. What is the state of the record?

(The record is read.)

By Mr. Wooden:

Q. Can you name some of them?

A. I could name some of the representatives of several of the companies, and while I know the representatives by sight, I could not recall their names this afternoon. If you want me to mention the companies concerned—

Q. (Interposing) Give me the best information and knowledge that you possess.

A. I have talked, and among other cement representatives who have talked to me on this question are Elmer Kilroy, representing the National Portland, and a man named Constantine—

Mr. Hershberger: I object, your Honor, on the ground
401 that Mr. Kilroy is not a representative of any respondent in the case.

Examiner Norwood: Let him complete the answer.

The Witness: Mr. Constantine, representing the Keystone Portland Cement Company, and two representatives of Medusa, Universal Atlas, and Alpha.

By Mr. Wooden:

Q. You have named all the representatives in so far as you now recall them?

A. I know these other representatives, but I don't know their names. They beat a constant path to my office the minute the tie bids come in, so I cannot help but know them and get well acquainted with their faces.

Q. Now, can you tell us what conversations you have

had, the substance of conversations you have had with any of these gentlemen, specifying where possible the name, the time and the place?

A. Frequently when they have asked me to make awards—

Mr. Leisure: (Interposing) Not "they," please. Let us have the person you were talking with and when you had the conversation.

Examiner Norwood: Do not repeat any conversation unless you can state definitely either the name of the person or definitely that the speaker was a representative of one of these respondents and tell us which one.

402 Mr. Leisure: And what his representation was. He may not have had authority to bind any of these companies in a conspiracy action.

Mr. Wooden: That is not a question of fact; that is more a question of law.

Examiner Norwood: If he can identify the conversation with one of these respondents, he can give it.

The Witness: I prefer before answering that in that way, to return to my office and prepare it in the form of a deposition and submit it to the Trade Commission, and I would be glad to produce the representatives of some of these companies who have had the conversations with me.

Examiner Norwood: You can bring your papers here and refresh your memory and testify today.

Mr. Wooden: But you are here now to give such information and knowledge as you now have in your mind.

Examiner Norwood: Yes.

Mr. Wooden: And as far as you can, I want you to answer the questions, just as you know the facts.

The Witness: Well, it is an impossible thing to ask me to answer the question and at the same time have these gentlemen insist on me naming the specific award. We have had hundreds of them, see? I cannot tell—for
403 instance—this is off the record. I cannot tell you—

Examiner Norwood: (Interposing) No, it is on the record.

The Witness: No, but I am explaining that I cannot tell you gentlemen which particular bid on which day Constantine ran to me for Keystone.

By Mr. Wooden:

Q. I am not asking you to do that.

A. Well, you asked me something, and with your permission I will tell you. I am glad to get it off my chest.

Q. You mentioned several companies by name.

A. Yes, sir.

Q. That you talked with on this subject?

A. Yes, sir.

Q. I am asking you to state the substance of your conversation with those gentlemen.

A. Well, now, is the substance of the conversation all right?

Mr. Leisure: Is it a town meeting in which he had all of them present and all talked at one time, and did he talk to them, or was it on different dates?

Mr. Wooden: You can ask him on cross examination if you like but not in advance.

Examiner Norwood: Gentlemen, one at a time.

404 Read the question.

(The question is read.)

Mr. Leisure: The question is objected to, your Honor.

Examiner Norwood: Objection sustained.

Mr. Wooden: Your Honor, that is incredible.

Examiner Norwood: I want you to identify the person with whom he had the conversation.

Mr. Wooden: He has named several, and I am asking him to state the conversation with those he named.

Examiner Norwood: Identify them with some of these respondents, and then you can give the conversations.

Mr. Wooden: He did; he did.

Mr. Leisure: He did not identify any conversation. He said he talked with some people and gave the names. Now he is starting to tell about "those gentlemen."

Examiner Norwood: Off the record.

(Discussion off the record.)

Examiner Norwood: Did you speak to these representatives collectively?

The Witness: No, sir.

Mr. Wooden: It does not make any difference whether he did or not.

405 Mr. Leisure: It makes a vast difference.

Mr. Wooden: No, it does not.

Examiner Norwood: Do you remember these definite conversations?

The Witness: I remember the occasion of each of them.

410 The Witness: There are numerous instances, but one in which I am able to cite the company—two in which I am able to cite both the company and the representative. Understand, this last time you did not ask me to cite the exact date.

This concerns Mr. Constantine, representing Keystone, and a Mr. George Holstrom representing Copley.

Mr. Wooden: Both are respondents in this proceeding.

The Witness: Both are representatives of the firms that I have mentioned.

On the occasion of tie bids being tabulated, for this maintenance cement that we buy, each of those gentlemen, and both of them, came to my office and asked me when that tie bid struck me, if I would award it to their company. I remember distinctly telling Constantine that the way to get that business was to cut the price a little. I told Holstrom representing Copley that I wish they would cut out the tie bidding and they would shrug their
411 shoulders and would say, "Well, you know we cannot do that."

By Mr. Wooden:

Q. Did you ask them why they could not do it?

A. I could not say that I did on the occasion to which I am referring, but I have in talking with other cement men, have talked over the whole situation.

Q. Did you get any explanation why it could not be done?

A. Yes. I understand the situation.

Q. What was it?

A. The inference to me—

412 The Witness: They explained to me they simply could not break the price; that their company would be penalized if they did.

Mr. Leisure: Is that the same conversation?

414 Q. Can you name any one who made statements that they had to keep the price or could not cut the price or else they would be penalized?

Mr. Leisure: Who is that? We are getting back to these same questions.

Mr. Wooden: I am trying to find out. I asked him if he could name any of them.

415 Examiner Norwood: Objection overruled.

The Witness: All of the representatives who have contacted me have given me that impression repeatedly.

Mr. Hershberger: I object to that. He cannot state his impressions, your Honor. A man can state conversations, but not impressions, because he may have been intending something entirely different.

The Witness: This thing is a burlesque, your Honor. These fellows talked very frankly, your Honor.

Examiner Norwood: Save the comments and answer the questions, when they are asked you. Objection overruled.

Mr. Wooden: Very frequently witnesses have to give evidence simply of impressions that were conveyed to them by conversations. It is the best they can do. We are all under that necessity at times.

By Mr. Wooden:

Q. I would again ask, however, whether you can specify any individuals or any concerns who made such statements?

A. All of the representatives whom I have named and others have told me the same thing, that they could not cut the price.

Mr. Hershberger: I have not yet, but I would like to make a specific objection on the part of the Universal Atlas, because he has not named any individual
416 of that company, and we do not believe that we ought to be bound by such statements.

Examiner Norwood: I think the objection has been made and it has been ruled upon and you have your exception.

Mr. Wooden: The question of who is bound and all of that will depend upon a great many more facts in the case.

By Mr. Wooden:

Q. One further question along the line we were pursuing, Mr. Colegrove. Did you get any explanation from any representatives of a cement company bidding on state requirements as to what was meant by being penalized?

A. No.

417 The witness identified Com. Ex. 13 as a copy of formal opinion No. 194 handed down May 26, 1936, by Attorney General Charles Margiotti, which placed upon the witness the responsibility of making the award in all cases of tie bids.

Mr. Wooden: I offer it in evidence.

Mr. Leisure: No objection.

(COM. EX. No. 13 was offered and received in evidence.)

418 The witness identified Com. Ex. 14 as a tabulation typical of instances of tie bids on state requirements. The State of Pennsylvania in asking for bids does not take a year's requirement or a definite period of time requirement, but it makes spot purchases for definite destinations and definite jobs. This is one of those with the proposals accompanying it which becomes the contracts after the awards are made, and it is marked up in accord with the responsibility placed on the witness by the opinion of the attorney general. The date of the opening was May 26, 1937, and it carries sixteen items, approximately twelve to sixteen different destinations, and the amounts vary from 132 barrels to 700 barrels.

Mr. Wooden: I now offer it in evidence, subject to the arrangement previously made that the data in it may be tabulated where necessary, or copied where
419 necessary, and the original papers returned to the witness.

(COM. EX. 14 was offered and received in evidence.)

The witness identified Com. Ex. 15 as a tabulation of the same kind, but under date of April 18, 1936, at which time the award of tie bids was settled by lot with the approval of representatives of the fiscal officers at the drawing. This was prior to the opinion of the attorney general going into effect.

Mr. Wooden: I offer that for the record subject to the same conditions as the preceding one.

Mr. Leisure: I wonder when this tabulation is made? Of course, the Government does not have to do it, but I wonder if they would make two copies so that we could have one?

Mr. Wooden: We will be glad to do that. I under-
420 stand there is a tabulation there now, isn't there?

The Witness: Yes, sir.

(COM. EX. 15 was offered and received in evidence.)

By Mr. Wooden:

Q. How do you determine awards in case of tie bids when you no longer do it by lot?

A. It has just been arbitrarily. There is no other word to express it. It is a terrific responsibility.

Mr. Wooden: That is all.

Cross-Examination by Mr. Leisure.

Q. Mr. Colegrove, it is quite a responsibility to determine how the public moneys will b spent in that way. That is what you mean?

A. Well, it places a terrific responsibility on a person to pick out of one to twenty-six all equal bids and equal quality, to determine who gets the order.

Q. And these salesmen that beat their way to your office, they are each one of them trying—

A. (Interrupting) To get the order.

Q. To get the order?

421 A. Yes.

Q. Have you had instances in any other type of things that you purchase where salesmen have bothered you too?

A. Quite a number of articles, but of course not to the relative extent of the cement business.

Q. Not as bad as the cement business?

A. No.

A. And that continues right down to date? They do that when these bids are let?

A. Of course, you understand the only bids that reach me directly are tie bids. Those are the only kind that I see personally.

Q. But those men are still doing that and they have been doing it for some time?

A. Yes, sir.

Q. Well now, that represents considerable competition, doesn't it?

A. Not as regards price.

Q. What does it represent competition in?

A. The only item of competition there at all, if there is any, is the competition of personal friendship or influence on somebody, and that is what puts the responsibility on me. If you canvass the awards I have made, I think you will find that they appear pretty much as though they had been drawn by lot.

422 Q. But the cement companies, from what you said, with their salesmen, are in considerable competition and of some kind?

A. Not as regards price.

Q. But they are trying to get the order?

A. On other bases than price.

Q. But won't you answer the question?

A. I am answering it.

Q. They are trying to get the order?

A. On other bases than price. The thing that relieves me is a low price, an dthe only time I get a low price on cement is when it is in a small quantity, 50 or 100 barrels, and some dealer puts a bid in at some rural spot or something and it happens to be under the established price delivered.

Q. Now, is your definition of competition such that you believe there is no competition when prices are identical?

A. There is no competition when price and quality is identical.

Q. When price and quality is identical?

A. That is right. Price, quality and service.

Q. What town do you live in?

A. I live in a small town.

Q. Have you got two competing drug stores there, sir?

A. Yes, sir.

Q. If those two competing drug stores both sell ice cream soda at 10 cents, do you believe they are in competition?

423 Not as regards price.

Q. That is not my question. I am asking you whether or not they are in competition as to selling those sodas.

A. I explained, I believe, that the only idea of competition that I can see between the cement companies in their dealings with my department is not in the matter of price. It is in the matter of attempting to use personal influence.

Q. You tell me about cement, but I am trying to find out how you base your theory of competition, and it is that when prices are identical, you believe that there is no competition, is that it?

A. There certainly is no competitive price.

Q. But suppose you are in business and you find that another man is selling products cheaper than you are. If you want to sell to the purchaser, will you lower your price to meet his competition?

A. If I felt I could and I had to make the sale.

Q. That's right. Now, if as a result of that, both of you quoted the same prices, would you feel that you are not in competition?

A. Not as regards price.

Q. In other words, when it comes down to being the same amount, then there is no competition as regards price?

A. That's right. And as regards quality. All of this cement is subject to the same specifications, highway 424 department approval.

Q. Now, let us take a hypothetical case I gave you as to meeting another competitor's price, and you came down to meet his price and he got the bid. Would you feel that you had not competed as to price?

A. No, if I had quoted a lower price—

Q. (Interrupting) The same price, I said; that is my question. Would you feel that you had not competed in price?

A. I would feel that I just pooled my selling prices with him.

Q. But you were not competing with him as to price?

A. No. I was meeting him, but I was not competing with him.

Q. With what?

A. I was calling his bet, but I was not competing with him. I was not raising his bet any.

Q. And when he took the business away from you, you feel he was competing with you?

A. He did not do it on a price basis; he got it through influence or luck or some other factor.

Q. He got the bid, regardless of how he got it?

A. Surely.

Q. So, when you started at a higher price when you had different prices, you felt you were in competition, is that right, in this hypothetical case?

426 A. I don't understand your question. When I start at a higher price? What do you mean?

Q. When you were competing, as I put the hypothetical case, and a man was selling at a lower price than you were, and you were selling at a higher price, did you feel that you were competing when you had higher prices?

A. No, he was meeting my competition that he had to meet to get the business.

Q. And when you lowered your price, competition ceased?

A. It would if I went under him.

Q. If you lowered your price to his price, competition ceased, is that your idea?

A. No, not if I met his price.

Q. It ceased?

A. Not if I met his price: I did not say it ceased.

Q. Won't you answer my question? You say when the prices are identical, that there is no longer any competition?

A. As regards price.

Q. But when you then met his price, competition ceased; when you lowered your price to his price, competition as to price ceased?

A. Practically so as to price.

Q. So, if all of the companies selling to you should lower their prices to you, if they were identical as they lowered them, there would be no competition?

426 A. That's right. If you all cut the same amount, we would be in the same position we are now, and I would still have to make an arbitrary award of the business.

Q. There was competition when they were not the same?

A. Never during my regime up there has there been a time when they were not the same.

Q. Take the hypothetical case.

A. Well, take an actual case.

Q. Take any hypothetical case where the prices are different. If you have a higher price, then you are competing with a man with a lower price?

A. I would say the fellow with the lower price was the one that was offering the competition.

Q. And you are two competing sellers while there are different prices?

A. Yes, but the fellow that is offering the low price is the active competitor in the market as it exists at that instant. I am looking at this from the viewpoint—

Q. (Interrupting) Do you mean that only the man with the lowest price is a competitor?

Examiner Norwood: I am very sorry, but we are going to have to adjourn until tomorrow morning at 10 o'clock.

The Witness: I could not conveniently come back tomorrow.

427 Mr. Wooden: As far as I am concerned, I would be willing to hold an evening session, because this witness wants to get back to his place of residence. It all depends on how much longer the cross-examination is. I

am willing to say right now, as to the present moment, that I have no further examination.

Examiner Norwood: If you had told me earlier in the day, I would have been able to prolong the hearing, but I have not been able to cancel an engagement already made.

Mr. Leisure: I do not want to prolong the hearing. We will finish with this witness now.

Mr. Wooden: You mean there are no further questions?

Mr. Leisure: Yes.

429 Washington, D. C.,
Wednesday, December 8, 1937.

430 HUGH E. WHITE was thereupon recalled as a witness on behalf of the Commission and, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Wooden.

Q. Mr. White, have you had in your possession since the close of the last hearing Commission's Exhibits 11 and 12 for identification?

431 A. I have.

Q. They consist, do they not, of the basic material that was supplied by Mr. Betts, the purchasing agent of the North Carolina Road Commission?

A. That is correct.

Q. What have you done with those Exhibits 11 and 12 for identification?

A. I have tabulated the bids showing the delivered prices quoted by the respective producers at the several destinations for both years 1936 and 1937.

The witness identified Com. Ex. 11A as a compilation of the destination prices quoted by the various producers to the North Carolina Division of Purchases and Contracts in February 1936, and that the list was made from the respective bids submitted as shown in the files. He can

432 vouch for the accuracy of these tabulations as based upon these original documents produced by Mr. Betts and formerly numbered Com. Ex. 11 for identification; he made a number of them and checked the others.

Mr. Wooden: I offer that tabulation in evidence, Your Honor.

Mr. Leisure: May we just look at it, please?

Mr. Wooden: Oh, surely.

Examiner Norwood: That is offered as a substitution to the original exhibit?

Mr. Wooden: Yes, with the understanding that the originals may be returned to the witness.

Mr. Leisure: As soon as we have a chance to check the tabulation with the original,—we had that understanding, Your Honor, that we would be able to see the originals before they were returned.

Mr. Wooden: That is correct.

By Mr. Wooden:

Q. Now did you put the names of the bidders on the tabulation or did you use some kind of a key number?

A. I used a key number there for brevity.

Q. Do you have a statement of the key numbers 433 and the names of the bidders?

A. Yes. They are indicated by a numbered symbol.

Mr. Leisure: Your Honor, I notice that in Exhibit No. 11-A there are certain marks made around certain figures. I would like to know what the purpose of them is.

Mr. Wooden: Can not that go until their cross-examination at this time?

Mr. Leisure: No, it may go to my objection to the exhibit.

Examiner Norwood: Can you tell him that?

The Witness: It was the intention to erase those marks but the work was hurriedly done and a photostat was made before the erasures were made. They merely indicate, I think in all instances, the cases where there were not identical bids.

Mr. Leisure: Where the bids were not identical?

The Witness: Where the bids were not identical.

By Mr. Leisure:

Q. Was it your intention to mark all the cases where the bids were not identical, as to why they have the circle?

A. A resume of them has been made, to which I was about to refer. I think we did.

Q. It was your intention to mark circles around all of the cases of identical bids, is that so?

A. For my own information only.

Mr. Wooden: Non-identical bids.

The Witness: Non-identical bids.

By Mr. Leisure:

Q. For non-identical bids?

A. That is right.

Q. You know of no other reason for putting the circles there?

A. No, I am not conscious of any other reason.

Q. The reason I ask, there are some cases here where there are non-identical bids which do not have circles around them. In fact the majority do not have circles around them.

A. In the case of Mill No. 75 that is true.

Q. Well, was there some reason for marking other mills, other than Mill 75?

A. That is correct. Further reference will be made to Mill 75.

Q. That may be, but I would like to know why you put the circles there. You have told me you made the circles because they were identical bids, but there was some other reason.

Mr. Wooden: Non-identical.

The Witness: Non-identical bids.

By Mr. Leisure:

Q. Non-identical bids. Was there some other reason?

A. That is true, with the exception of Mill 75.

435 Q. Why did you exclude Mill 75?

A. Well, there were uniform differences of three and four cents in the case of Mill 75. We do not know what the reason was for those, but we noticed that there is that difference of three and four cents.

Q. So in Mill 75 you excluded the circles, you did not use the circles?

A. That is correct.

By Mr. Wooden:

Q. What was Mill 75?

A. Mill 75 was the Superior Cement Corporation which, as I have said, quoted uniformly three or four cents higher than the other mills at all destinations.

Mr. Leisure: We have no objection to this exhibit, Your Honor, pursuant to our original understanding.

Examiner Norwood: Yes.

Mr. Wooden: I wish to add that there is part of it, this key which the witness has described, which will identify the various bidders that appear on the tabulation only by number.

Mr. Leisure: May we see the key? Are you going to include that as part of the exhibit?

Mr. Wooden: That is included as Exhibit 11-B.

Mr. Leisure: Is it marked?

436 Mr. Wooden: The reporter has marked it for identification, yes.

By Mr. Leisure:

Q. Mr. White, does the key include all of the companies that are on the exhibit?

A. It does.

Mr. Leisure: No objection, Your Honor.

(COM. EX. 11-A and 11-B was offered and received in evidence.)

By Mr. Wooden:

Q. Now these key numbers, Mr. White, are they the same key numbers that were used for the same companies on Exhibit 1, that being the map showing the location of cement mills?

A. That is correct.

Q. Have you prepared a summary of the tabulation, Exhibit 11-A, that shows the number of identical delivered prices and the number of variations?

A. I have.

Q. Will you state what the results of your examination of the exhibits were in that respect?

A. For the year 1936?

Q. Yes.

A. Speaking now of Exhibit 11-A, there is con-
437 tained on that tabulation a total of 1,536 bids,—rather that number of quotations combined, of which 113 were made by the Superior Cement Company,—excluding the Superior Cement Company,— all of which I have already said were different from the others to the extent of three or four cents per barrel.

Q. Higher than the others, I think you said?

A. Higher than the others by three or four cents per barrel. The only discrepancies found—

Q. (Interrupting.) What do you mean by "discrepancies?" You mean the only differences found?

A. The only differences.

Q. All right.

A. (Continuing.) —found were in the case of Mill No. 74, which quoted a delivered price of $2.66 for West

Jefferson; whereas all other producers quoted $2.67. The same mill quoted $2.66 at Burnsville, while others quoted $2.67.

Mill No. 3 quoted at Concord Delivered price at $2.81 per barrel, while all others quoted $2.80.

Mill No. 1 quoted delivered price for New Bern, the delivered price of $2.71 per barrel while all other producers quoted $2.60. In connection with that quotation there is a note appearing on the quotation made by that company.

Q. That company was that? What was the name of that company?

A. Universal Atlas. On the quotation by that
438 company, dated February 11, 1937, there is this note appears: "For New Bern only. For other points in Craven County our current price at New Bern, $2.71."

Mill No. 49 quoted for the same destination, New Bern, $2.71. While I have said that all others quoted $2.60, and Mill No. 53 did likewise.

Mill No. 70 quoted a delivered price from Marshall of $2.88 per barrel, while all other producers quoted $2.68.

Q. Does that comprehend all of the variations shown in Commission's Exhibit 11-A?

A. With the exception of those made by the Superior Cement Corporation, to which I have already referred.

Mr. Leisure: Before you leave that Exhibit may I ask what he has just been reading from?

Mr. Wooden: Yes.

By Mr. Leisure:

Q. Mr. White, did your tabulation, that you have just been reading from now, did that include the number of lettings as well as the bids?

A. Those contracts we find are executory contracts, and they provide the prices, or name the prices at which cement will be supplied by the respective bidders at different times and for different destinations as required during the years.

Q. But you have given us, from the tabulation,—which I have not objected to,—a resume of an exhibit. I am
439 asking you if in your tabulation, or your resume, you included the lettings as well as the number of bids?

A. That information is not contained in the files. The number of barrels purchased at the time is not contained in the files.

Q. The number of lettings is not included in the files?
A. No, sir.

By Mr. Wooden:

Q. Just the bids are contained in the files, that is all you had to go on?
A. That is right.
Q. How many cases of variation from the usual delivered price, delivered prices, did you find in your Exhibit 11-A?

440 A. Excepting now the quotations made by the Superior Cement Corporation which were as I have said, three or four cents per barrel higher than the others, there were a total of seven.
Q. Seven out of how many?
A. 1536.
Q. You have had considerable experience as a railroad rate man, have you not?
A. Yes, I have had some.
Q. Based upon your experience as a railroad rate man, can you account for those instances where the Superior was uniformly 3 or 4 cents higher than the remainder?

Mr. Leisure: I object to that question, Mr. Examiner, as incompetent, immaterial and irrelevant and no proper foundation being laid for the question.

Examiner Norwood: Objection overruled.

Mr. Wooden: He is dealing with delivered prices, of course, which would include the freight element.

The Witness: I have no means of knowing what constituted those differences, but it is noticeable that the amounts of 3 and 4 cents which I have mentioned are in some cases exactly the difference between the emergency charges applicable in those instances, the amount of emergency charge at that time being 7 percent of the rate, with

441 a maximum of 1 cent per hundred pounds.

By Mr. Wooden:

Q. In other words, the Superior Company seemed to have included the emergency freight charge, whereas others did not; is that what you mean to say?
A. My guess is that is what they did.
Mr. Leisure: Will you fix the date on that?
Mr. Wooden: This is 1936 biddings; February, 1936.
The Witness: Those bids were many of them dated February 11th. At least, that was about the date.

The witness identified Com. Ex. 12A and Com. Ex. 12B as a similar tabulation based upon bids submitted to the State of North Carolina in the early part of February 1937 and contained in Mr. Betts' file. He used the
442 same key numbers to identify the bidders in that tabulation that he did in the 1936 bidding. The witness assumed that the same explanation applied as to these circles around the mill numbers as applied to the other exhibit, that is, they were to designate non-identical bids.

By Examiner Norwood:

The tabulations described are received in evidence as Com. Ex. 12A and Com. Ex. 12B, and are substituted by agreement for the old exhibits.

442 (COM. EX. 12-A and 12-B was offered and received in evidence.)

447 Q. Now that you have both of those exhibits before you, will you just look at them and tell his Honor whether or not the prices went up or down between 1936 and 1937?

A. Referring now to the delivered prices. I notice there is a difference in some instances and not in others.

Q. Where you notice those differences, do you notice that the prices are lower or higher? I point out for instance in Exhibit 12, Alexander, the fourth line from the top. That is what?

A. $2.78 in 1936 and $2.71 in 1937.

Q. The next line below that, Anson County.

A. The delivered price quoted in 1936 was $2.79 per barrel, and in 1937, $2.61.

Q. That was a drop of 18 cents in that instance?

A. It appears so.

Q. Just a general question, Mr. White. Did you find in going over these very carefully and in making this tabulation, did you find a single instance where the price was higher in 1937 than it was in 1936?

448 A. I don't recall. They were not checked for that purpose.

Mr. Leisure: That is all.

Redirect Examination by Mr. Wooden.

449 Q. Now, regarding this Wadesboro quotation in 1937, compared with 1936, the price dropped how much?

A. Apparently there is a difference in the delivered prices quoted there of 18 cents.

Q. Compared with the preceding year?

A. That is right.

Q. Were the quotations for Wadesboro in 1937 at that lower price all identical or not?

A. There were 16 identical quotations.

Q. All of $2.61?

A. That is correct.

Q. Delivered at Wadesboro?

A. That is right.

Mr. Wooden: That is all.

Recross Examination by Mr. Leisure.

Q. All at the lower price, however?

A. Yes.

Mr. Leisure: That is all.

450 FREDERICK L. STONE, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

451 *Direct Examination by Mr. Wooden.*

I am Vice President with the Universal Atlas Cement Company and have been connected with that concern since 1911. I have been the active managing official of certain parts of the company during a long period of time, but I am not the chief executive official. That is Blaine S. Smith, the President. I was the head of the sales department until the 1st of last August and have been the head of said department since July, 1938 [?]. I have not served at any time as an official of The Cement Institute.

Q. Have any other members of your organization
452 served as members or officials of the Cement Institute?

A. Yes.

Q. Who?

A. Mr. Smith, the president, is now a director of the Institute and Mr. Reiter was formerely secretary and general manager, I believe his title was.

Q. Did your Mr. Affleck have some official status in the Institute?

A. Prior to his retirement, yes.

Q. And when did he retire?

A. September 1, 1936.

453 Q. And what was the nature of his official connection with the Institute?

A. He was a director, as I recall it, or a trustee, I should say, a trustee.

Q. Were you subordinate in your organization to Mr. Affleck or to Mr. Smith?

A. I was subordinate to Mr. Affleck while he was president of the company and I am now subordinate to Mr. Smith, who is president of the company.

By Mr. Wooden:

Q. Who are the owners of the Universal Atlas Portland Cement Company?

Mr. Leisure: If Your Honor please, I object to that. That is incompetent, irrelevant and immaterial. It is not within any of the issues of this complaint. It is not material to any of the issues who the owners are.

454 Examiner Norwood: Well, that can be clarified. I think he can show a community of interest or control outside of the legal control or legal ownership.

Mr. Leisure: He can show who the officers are, but to give his conclusion as to who the owners are is incompetent, irrelevant and immaterial. I object to the question.

Examiner Norwood: I should not exclude that unless its irrelevancy appears clear.

A. The stock, I believe, is wholly owned by the United States Steel Corporation.

455 Mr. Clark: I move to strike the answer on behalf of the companies that I represent, on the ground that it is a mere expression of the witness' opinion.

Mr. Wooden: Is not that a matter of rather common knowledge, Mr. Stone, that that is the case and it has been for years?

The Witness: Yes, sir.

By Mr. Wooden:

Q. What would you estimate as the capacity of the Universal Atlas Cement Company, from a production standpoint?

A. In the neighborhood of 35,000,000 barrels.

Q. That has the largest productive capacity of any unit in the industry, has it not?

A. Yes, sir.

Q. What is the next largest?

A. I would be answering that not with absolute knowledge.

Q. You have statistics on it, do you not, and sources of information?

A. Yes, sir.

456 Q. From the reports of other companies?

A. Yes, sir.

Q. Well, based on that accepted statistical information what would you say?

A. The Lehigh Portland Cement Company, I think.

Q. And its estimated capacity is what?

A. I think somewhere around 25,000,000 barrels.

Q. And which company would you rank as the third largest?

A. The Lone Star Cement Corporation, or the Alpha Portland Cement, the Pennsylvania-Dixie Portland Cement Company.

Q. Where would you place their estimated capacity?

A. I am speaking now offhand, without looking at the records. I think around 12,000,000 barrels.

Q. Each?

A. Yes.

Q. If I suggested that Lone Star had an annual capacity of 18,000,000 barrels, would that lead you to change your estimate a moment ago?

A. I do not recall the figures offhand. I am giving my recollection. I have not looked at them for some time.

Q. Well, we have I think some exhibits in the record that show figures along those lines back about 1929, 1930, and 1931, that show the production at least, where the capacity was higher.

Where would you place the Huron and Marquette

457 Companies in the order of importance from a capacity standpoint?

A. I think that Marquette is around 7,000,000 barrels and Huron around 5,000,000 barrels.

Q. As salesmanager of your company you have made it a point, have you not, to get as good an idea as you can of the relative capacities of your various competitors?

A. Yes, sir.

Q. Will you state where your mills are located?

A. At Hudson, New York, Northampton, Pennsylvania, Universal, Pennsylvania, Leeds, Alabama, Waco, Texas, Independence, Kansas, Hanibal, Missouri, Buffington, Indiana, and Duluth, Minnesota.

Q. Making how many?

A. Nine. I think that is all of them.

Q. Who are your principal competitors in the territory running from Chicago eastward as far as Cleveland and in the northern half of Indiana and Ohio?

458 A. There are numerous mills, and from memory I may neglect to include some of them. Of course that covers quite a little territory. Perhaps all of these companies do not operate, or do not ship habitually into every section of the territory named.

By Mr. Wooden:

Q. Indicate them in the order of their importance as you consider them in that territory.

A. What would be the measure of importance?

Q. Make your own measure, anyway you like.

459 Mr. Leisure: Now I object to the question unless he specifies what he means by "importance". If he is talking about the capacity of the mills I have no objection.

By Mr. Wooden:

Q. On the basis of productive capacity what would you say?

A. It is rather difficult from memory to mention them in the order of importance as described in that way. I perhaps can name them. I hope I will name them all, with the idea that I might be allowed to rearrange them as to importance after having named them.

Q. That is all right.

A. Lehigh. Shall I give the full name of the company or simply the short designation?

Q. I think the short designation is sufficient.

A. Lehigh, Marquette, Medusa, Huron, Wolverine, Peerless, Petosky, Manitowoc, Wisconsin, Southwestern, Wabash, Lone Star, Cosmos, Speed, Pittsburgh Plate Glass, Diamond, Bessemer, Alpha, Standard,—that is a good many of them.

Q. Did you name Aetna?

A. No, I believe I did not. Aetna also.
Q. How about Castalia?
A. Castalia, yes.
Q. Is Consolidated in there too?
A. If I am correct, in my mind, yes.
460. Q. Which among them would you class as the first five in importance as competitors?
A. As to the size of the company, you mean?
Q. Yes, sir.
A. Well, the size of the company there does not enter into it so much as the size of the individual mill. A large company may have a comparatively small mill.
Q. Those mills that are effective in that territory.
A. In a general way there is Lehigh, Alpha, Marquette, Huron and Medusa, I would say are the major companies.
Q. Is the Wabash important in there?
A. Yes, they are of importance.
Q. Now if you would take the State of Michigan,—you cover lower. Michigan, do you?
A. We try to.
Q. What are the most important competing companies in that territory?
A. Huron, Peerless, Wolverine, Aetna within the State, and Wabash, Southwestern, Medusa, Marquette—this is Michigan you are speaking about?
Q. Yes.
A. I will exclude Marquette from that answer. I think that is all.
Q. Now, Mr. Stone, have you had, from time to time, any conferences or meetings with these other com-
461 petitors that you have named in that territory?
A. There have been meetings, yes.
Q. Will you state under what auspices and circumstances these meetings were held?
A. During the code days I would say that requires no answer, it is obvious; since then,—I refer particularly to meetings for the purpose of establishing rates of special dues payable to the Portland Cement Association for promotion work in the localities affected.
Q. Have you had any meetings or conferences with competitors that you have named, or their representatives, devoted to a discussion of competitive conditions and competitive practices?
A. I think I have attended no such meetings since the

code days, with the possible exception of the checking of duplicated contracts.

Q. What about prior to the code? Did you attend meetings of the character that I asked you about?

A. Only those meetings of the companies as members of the Portland Cement Association for the purpose stated, and for the checking of contracts under the Cement Institute.

Q. Have you attended any meetings with competitors in this territory that you have named since the code at which you discussed such trade problems as trucking?

'462 A. I do not recall such a meeting.

By Mr. Wooden:

Q. You mean you are not sure, or what?

464 The Witness: What is the question?

By Mr. Wooden:

Q. It was to the effect as to whether you had attended meetings with representatives of these other competitors that you have named since the code, at which you discussed such trade practices or problems as trucking?

A. I think my answer was, I recall no such meeting since the code.

Q. I believe so. Then my subsequent question was, does that mean that you are not sure, or what you did mean?

A. Trucking is a pretty generally well known thing in the industry, that has formed the topic of many conversations, but I do not recall discussing trucking as such at any meeting since the code.

Q. Do you recall any meetings by you and representatives of your competitors where such topics were discussed as the variation in delivered prices?

465 The Witness: No.

By Mr. Wooden:

Q. Do you recall any meetings since the code, attended by you and representatives of your competitors at which the various marketing policies of various concerns was discussed?

A. Not since the code.

Q. How about prior to the code? The same question.

A. When the N. I. R. A. act was passed, there were some preliminary discussions before the actual code was

up for consideration. In other words, preliminary discussion as to a code.

Q. As to what should go into the code?

A. As to what should go into the code, yes.

Q. But what is your answer with regard to the subjects that I have outlined in my previous questions?

A. As to price variations?

Q. Yes. And marketing policies and trucking.

466 A. I know of no discussions of price variations, no discussions other than general conversation regarding trucking since the code—and what was the third point?

Q. Marketing policies.

A. And marketing policies since the code.

Q. How about prior to the code? I want to get that straight.

A. Prior to the code, there was some preliminary discussion of various matters with respect to the probable inclusion in a code later to be put together.

Q. But prior to the passage of the N. I. R. A., what would be your answer to the question?

A. I recall no meetings on any one of those points. I do recall general conversation about trucking.

Q. Did you have any meetings during the formative periods of the code, that is after N. I. R. A. and before the code was actually approved, that related to any matters other than those directly involving the code or the proposed code?

A. I no not recall attending any such meetings.

Mr. Wooden: No further questions.

Cross-Examination by Mr. Leisure.

Q. Mr. Stone, have you had any experience on this question of identical bids in your company?

A. Yes, sir.

467 Q. It was testified to here the other day that when bids were equal, when they were identical, that that meant there was no competition. Is it your experience that you do not have a competitor in the field when your bid happens to be the same as one of your other competitors?

Mr. Wooden: Your Honor, I think the testimony was that there was no price competition.

By Mr. Leisure:

Q. I will amend my question to price competition.

A. I think there is price competition; in fact, I know it.

Q. In other words, do you feel that the price got to be identical because of competition?

A. Yes, sir. That is, in the end. It is not identical as it has been testified to here in the case of every individual transaction, but in the long run the price must be identical because of the very nature of our business, as I see it.

Q. In other words, as the complaint so well states in this case, no one would pay a penny more for cement if they could get it for a penny less, is that right?

A. That being the idea. That being the rule as much as any rule in life I know. There are always some minor exceptions to any rule.

Q. Now, is it necessary for you to get together and have an agreement as has been suggested by counsel
468 for the Commission on these prices, or how do you determine what the prices are at any given time?

A. There is no occasion for getting together,—answering that part of your question. Now, as to the general question of price, there has been so much misunderstanding that it would be my desire, if permitted, to attempt to reduce the whole question to some very low ground or common denominator, so to speak, and build up rather than simply attempt to answer questions that are wholly detached regarding cement prices. There has been so much misunderstanding and it has gotten into such a turmoil that in my opinion at least, it needs straightening out by the use of simplicity.

Q. Will you just continue?

A. Well, may I assume that there is not a single cement mill in the country—

470 By Mr. Leisure:

Q. Go ahead and complete your statement.

A. On the line that I have just begun?

Q. Yes.

A. I think I have said, let us assume that there is not a single cement mill in the United States. Then let us place one somewhere near the center of population, which would be say somewhere in the State of Indiana. It
471 is obvious to me, at least, that that mill would sell its products—

474 By Mr. Leisure:

Q. Mr. Stone, will you tell his Honor whether or not you had any meetings for the purpose of fixing prices on identical bids?

A. No, sir.

Q. How did you arrive at your prices where identical bids appeared, you and your company?

A. We have quoted the prices that we ourselves have set up within territories near our plants, but as we would go beyond the confines of those territories as limited by freight rates, we have encountered lower prices quoted by our competitors. That is in our day-to-day business over a long period of time; therefore, when we come to quote on a specific inquiry from the government or from anybody else, we use that knowledge so gained through our day-to-day routine business and figure our prices accordingly on the specific inquiry at hand.

Q. And that also applies to commercial business as
475 well as to business for the government?

A. All business.

Q. And does there or does there not come to be a standard price just as in unlisted securities based on over-the-counter dealings, does there or does there not come to be a standard price in that community?

A. That is the case with certain few exceptions here and there.

Q. And is there or is there not anything secret about those prices?

A. Nothing secret.

Q. Are they or are they not readily ascertainable by any company competing in the field?

A. Easily.

Q. Just how?

A. Speaking for our company alone, we have some 150 salesmen continuously traveling the territory. We have some friends among the trade. We have found that competitive companies when they change their prices, put out hundreds and perhaps thousands of quotations. We learn of those quotations through at least those two sources, from the traveling salesmen and the friendly cement buyers in the trade.

Q. So that if you hold a meeting, such as has been suggested, the prices are known before you hold the
476 meeting? There would be no occasion for agreeing upon anything?

A. Yes, sir.

Q. Do you ever agree in any of those meetings upon anything in the way of prices?

A. No, sir.

Q. How long does it take to get this information as to the price in a given community, such as you have been describing?

A. Well, I would say anywhere from fifteen minutes to twenty-four hours.

Q. Now, there has been a great deal of testimony here since the hearing began about the secrecy of the land grant freight rates. Are you familiar with land grant freight rates?

A. I do not handle them personally, but I know our people secure—

477 Q. You were asked about the connection of your company with the United States Steel Corporation. Is that company a price leader, your company?

478 A. A price what?

Q. Is your company the price leader in the industry?

A. No, sir. I know of no leader in the industry on prices.

Q. Will you explain that answer?

A. Over a long period of time, I have seen price changes published by any number of companies.

Q. Is it a fact or is it not a fact that price leadership varies with every sale?

479 The Witness: I am not sure I understand the full meaning of the question.

By Mr. Leisure:

Q. Well, there is a sale about to be made, either commercial or by sealed bids, a price is arrived at in that community. Now, is there or is there not a price leader in that community which quotes the lowest price, either commercially or to the government, in every given situation?

A. I see now what you mean. He has already done so at some previous time to the time that you speak of.

Q. And does that or does that not make him the price leader so far as that particular sale is concerned?

A. In that sense, yes. I simply did not understand what you meant by the word "leader." In that sense, that is the case.

Q. Would you or would you not say that in every given instance, there is a price leader in the community
480 where the sale is made.

A. Yes. In the sense that some one has made a price in that community.

Mr. Leisure: That is all.

Redirect Examination.

By Mr. Wooden:

Q. Now, Mr. Stone, you say that identical delivered prices is simply the result of competition?

A. Yes, sir.

Q. Perfect competition?

A. From my point of view, yes.

Q. Have you had meetings at which you attempted to promote that kind of perfect competition?

A. Promote that kind of perfect competition? No, sir.

Q. Why shouldn't you if you are trying to promote competition? Why shouldn't you have meetings for that purpose?

A. You mean, have meetings in order to arrange that prices be uniform?

Q. In order to arrange that the competition which you say is so perfect when the prices are uniform at destination.

A. We have meetings to promote that idea?

Q. I say, why shouldn't you have meetings to promote that kind of competition if that is competition?

A. In the first place, I see no necessity for such meetings.

481 Q. You see no legal objection to it, do you?

Mr. Hershberger: I object, your Honor, to that.

The Witness: I am not a lawyer.

By Mr. Wooden:

Q. You have legal advice on these matters?

A. Yes.

Q. Haven't you had legal advice that there is no objection to your promoting competition?

A. I do not think we have ever sought legal advice on that point.

Q. Have you ever attended meetings for the purpose of promoting the price competition that you say is represented by the uniform delivered prices?

A. No, sir.

Q. If the uniformity in delivered prices is perfect competition, what are these instances of deviations from the uniform delivered prices? Is that competition or not?

A. That is a form of competition.

Q. Imperfect or perfect? How would you characterize it?

A. Well, I am afraid I will have to ask you to define your meaning of "perfect" and "imperfect" as used by you in that connection.

Q. Well, I think you have agreed that it was perfect competition if all of the bids at destination were uniform?

A. Using my interpretation of the meaning of the
482 word "perfect."

Q. I am asking you what these instances were where they do not have absolutely identical delivered prices,—what are they? If the other is competition, what are they?

A. That is a form of competition.

Q. Price competition?

A. Yes, sir.

Q. In other words, your view is that you can have price competition that lacks uniformity, and price competition that is uniform, is that right?

A. May I be allowed to explain?

Examiner Norwood: Certainly.

The Witness: I think perhaps you are speaking of competition in price alone in individual transactions. I am speaking of price competition that I consider is always present continuously in the cement business, affecting in various degree perhaps, all transactions; in other words, I myself describe it as the constant impact of competition on the cement market generally.

By Mr. Wooden:

Q. Now, when you get reports from your salesmen about prices quoted by competitors, those are delivered prices, are they not?

A. Usually, yes, sir.

483 Q. All you have to go on in figuring your future prices then, I assume, is what you last heard about your competitors' prices?

A. That is true, yes, sir.

484 Q. You have no assurance that on the next sale, or the next bid the prices you last heard of would be applied?

A. Except for the fact that the salesman I spoke of are in continuous touch with the trade, and had there been changes issued by some other company or companies we believe that we would have learned of them.

Q. You recognize that there are such things as the basing point mills and non-basing point mills?

A. There again it is a matter of definition. I myself,—perhaps I have a peculiar view,—my own view is that we use a lot of jargon in the industry, and have allowed others to use it,—by "others" including the Federal Trade Commission,—so that a lot of misunderstanding has grown up through misuse of words.

Q. There has been a widespread use of the words "basing point mills"?

A. Yes.

Q. And "non-basing point mills"?

A. Yes, sir.

Mr. Leisure: Have you finished your answer as to what you understand to be this misunderstanding? You were answering about basing point mills.

Mr. Wooden: He has answered my question.

Mr. Leisure: Have you finished your answer?

The Witness: I can elaborate on that, I think, to 485 a considerable extent.

Mr. Leisure: Will you finish your answer, if you have not finished it?

Mr. Wooden: It calls for no explanation or amplification that I can see, Your Honor. The question calls for a yes or no answer certainly.

Mr. Leisure: Now we are not playing a game here, Your Honor. Here is a witness that is an important officer of an important company and he is asked by the counsel about basing points, and the witness is here ready and willing to tell him. Do not we want to hear it?

Examiner Norwood: Well, he has the privilege of going into that, if he wants to.

Mr. Wooden: I am going into it just in part.

Examiner Norwood: Read the question, Mr. Reporter.

(The question was read.)

The Witness: Am I to continue?

Mr. Leisure: Did you explain what you meant by "basing points"?

The Witness: I had not finished my answer, no, sir.

Examiner Norwood: The counsel's question is not

calling for an explanation. You can ask him another question on basing points.

486 Mr. Wooden: I did not ask for an explanation, I asked what the prevailing state of the usage of the language in the industry has been, and he has stated it. They recognize basing point and non-basing point mills.

Mr. Leisure: Did you answer it that way, Mr. Witness?

The Witness: No, sir.

Mr. Leisure: I did not understand it that way.

Mr. Wooden: The record will speak for itself.

Examiner Norwood: Complete your answer.

By Mr. Wooden:

Q. I mean that there were such things as non-basing point and basing point mills.

The Witness: Might I have the last sentence of my answer read so I might pick it up from there?

(The answer was read.)

A. By that I mean that the use of the expression, or words, or phrase "basing point mills, non-basing point mills, absorption of freight, charging in phantom freight," the use of all such expressions, in my opinion, has served to get the situation into such a muddle that my only desire has been to try and simplify, and if I may be permitted I will attempt to use other words than those commonly used in the industry.

Mr. Wooden: All I want to know, Your Honor, is whether it is common usage in the industry to refer

487 to basing point and non-basing point mills, and, as I understand it, he said that it was.

Examiner Norwood: All right.

By Mr. Wooden:

Q. When you get reports from your salesmen, as you say, about prices of other mills, they are all delivered prices, I believe you said?

A. Yes, sir.

Q. You figure back, as I understand it, by deducting the freight to find out what their mill base price is?

A. If I may say that same thing in different words, yes, sir, I would say we take the delivered price and deduct from it the freight rate from the mill owned by the company making that quotation, and we thereby arrive at a figure which we check by finding many, many other quotations, and after we have checked it sufficiently to satisfy

ourselves we come to the conclusion that the mill in question is using a figure at its mill to which it adds freight in the case of all destinations except where it runs into competition of lower prices.

Q. If a mill that you are dealing with in that way is a non-basing point mill it would not help you any to figure it back to the mill shipping point, would it? You would have to figure it back to the mill base point, would you not?

A. Our experience in the business—

Q. (Interrupting) Can not you answer it yes or no?

488 A. No, sir.

Mr. Leisure: We asked him to explain the non-basing point mill and counsel has objected, and now counsel is asking about a non-basing point mill.

Examiner Norwood: If that does not please you you may go further into the subject.

Mr. Leisure: I think he ought to be allowed now to explain the non-basing point mill.

Examiner Norwood: Read the question, Mr. Reporter.

(The question was read.)

Examiner Norwood: I think counsel can go further into it if they want to.

A. When I said I could not answer it yes or no, what I meant was if I answered it yes or no it would not be a complete answer.

By Mr. Wooden:

Q. You can answer it either way and then give such explanation of your answer as you see fit.

A. I see. In the case of a non-basing point mill, so-called, we have learned in our day to day business that certain mills are in that class, and to describe it in another way, they are a class of mill that do not attempt to make their own prices, they simply follow prices put out by others. Therefore, when we are figuring our prices in

489 any individual case to meet competition, or to get the business against competition, we pay no attention to the so-called non-basing point mill.

Q. You assume the non-basing point mills are basing their prices on the basing point mills, do you not?

A. We assume they are charging the same delivered prices on the article.

Q. That means, does it not, that the non-basing point mills are basing their prices on the basing point mills prices?

A. Using the jargon I have referred to a moment ago, yes, sir.

Q. If you get this perfect competition by uniform delivered prices on commercial business how does it come about that you have not it also when sealed bids are filed?

A. I was attempting to start out to explain that awhile ago when interrupted by objections. I think, Mr. Wooden, that the thing has been made so complicated that unless I, as a witness, am allowed to attempt to simplify it, and in order for my answers to be based on simplicity, I do not quite see how I can make myself clear.

Q. You have an opportunity here, of course, before the case is over, for the respondents to put in their theory of the case, and so on. I merely wanted one answer to that one question.

Examiner Norwood: Read the question, Mr. Reporter.

490 (The question was read.)

A. Just what sealed bids do you refer to, Mr. Wooden? I am not sure I understand your question.

By Mr. Wooden:

Q. Bids for purchases by State governments, sir.

A. You mean where they are not uniform?

Q. No, where they are uniform.

A. Where they are uniform?

Q. Yes.

A. Well, when we quote purchaser A, who may be a private commercial customer or buyer, and purchaser B who may deal with the Government, in each case we get the price that we believe is the going market price.

Q. In other words, you make no difference between the price on commercial business and the price on sales to the larger purchasers such as governmental agencies?

A. You mean by that quantity variations?

Q. Yes.

A. No, sir. As a general rule I think there is no—

Q. (Interrupting) The carload price for one carload is the same as a price on bids for 100,000 barrels?

A. Yes, sir.

Mr. Wooden: That is all.

Examiner Norwood: Any further questions?

491 *Recross Examination by Mr. Leisure.*

Q. Mr. Stone, in these answers that you have been giving you have been talking about your own company, as to how it arrives at its prices?

A. Yes, sir.

Mr. Leisure: That is all.

(Witness excused.)

494 Mr. Wooden: Your Honor, the witness Betts from North Carolina has supplied certain data in confirmation of his oral testimony to the effect that prior to 1934, various companies made bids and contracts on the basis of basing point prices. I have photographs made of three of these contracts and have had them numbered Commission's Exhibits 16-A, B and C for identification and I offer the photostats under that number with the understanding that the originals may be returned to Mr. Betts.

Mr. Leisure: Is this the material that the witness told me before he left that he would send back to me for me to have an opportunity to examine? Is that what this refers to?

Mr. Wooden: I think it is a part of it. It is what the Examiner had this morning, which was received from Mr. Betts.

Mr. Leisure: Since this is evidence that I asked for, may I suggest, without taking the time of the court here and now,

I would like to have an opportunity to examine it later.

495 I do not want to object to it without knowing what it is.

Examiner Norwood: Do you want to examine a witness on it?

Mr. Wooden: No, there is no one to be examined.

Examiner Norwood: Then you may defer the offer until Mr. Leisure has had a chance to examine it.

Mr. Wooden: I might say that among the papers was one contract with the Universal Atlas Company, which may be considered in connection with Mr. Stone's testimony this morning.

(The papers were marked "Commission's Exhibits 16-A, B, and C for identification.")

HAROLD S. CREE, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

At the present time and since July, 1936, my occupation is that I am trying to develop a representative business in sewer pipe and lime and incidentals like that that go to harmonize with building construction. My full name
496 is Harold Stevens Cree. I live at 810 Mohican Road, Birmingham, Michigan, which is a suburb of Detroit. I was previously connected with the Aetna Portland Cement Company for approximately 26 years in the capacity of sales manager, traffic manager, advertising manager and you might say general counsel as to the welfare of the progress of the company. I was sales manager practically since the time the company started.

Q. Will you give a brief history of the develop-
497 ment of the Aetna Company's business as it developed under your sales managership?

Mr. Leisure: Now, if the Court please, that question is objected to as being entirely too broad. If there are any specific questions that counsel wants to address this witness' attention to, he may do so, but to ask him to give the history of a company for which he worked, in a litigated matter, I submit is much too broad.

Examiner Norwood: I think he said a brief history, didn't he?

Mr. Wooden: Yes, I merely want him to tell what the company's business is like in volume, in size, and facilities, when he first went with it, and how it has developed and how it was when he left it.

Examiner Norwood: I will overrule the objection and ask the witness to give a brief statement containing that information.

The Witness: Well, when I started with the Aetna Portland Cement Company, it was a little plant, practically an obsolete plant in the little town of Fenton, Michigan, outside of Detroit, and about 45 miles between Flint and Saginaw, and just about 20 miles the other side of Pontiac. At that time it did not have any particular customers or business, it was just about ready, as you might say, to fold up.

498 Mr. Leisure: May we have the date fixed? He says at the time he started, and I would like to have the date fixed.

The Witness: Approximately 26 years ago; it would be 27 now.

Examiner Norwood: Go ahead.

By Mr. Wooden:

Q. That would be about 1910 or 1911?

A. Around about 1910,—yes—or 1909; 1910, I think. About the time the concrete roads first started. I remember that.

Q. All right. Go ahead with your description.

A. When I started, it was as a young fellow with that company, and I made friends, I made customers and developed efficiency to the point that we gradually realized that we were making money and made lots of money. We revamped the plant, and then became still wealthier and decided to build a new plant; and I was quite instrumental in picking out the particular site in Bay City on the water for this new plant, because I had a perspective in my own little minute mind as to further development of this particular company.

Q. What was the capacity of the two plants that you have in mind?

A. The first plant had a capacity of around approximately 500,000 barrels. And then the addition of the
499 Bay City plant augmented that capacity to approximately a million barrels of cement; maybe 1,200,000.

Q. Was the building of the Bay City plant financed out of earnings of the other plant?

A. It was.

500 By Mr. Wooden:

Q. What was the capitalization of the Aetna Cement Company?

A. Half a million dollars, $500,000.

Q. Did it remain that during all of that time that you were with them?

A. Yes.

Q. How much does that figure per unit of productive capacity?

A. Well, as I have said before—

501 Mr. Leisure: (Interposing) May we have the date fixed again on that question? I do not know when that applies to,—whether that is now or 26 years ago.

Examiner Norwood: Counsel can bring that out when he cross-examines him, I think.

The Witness: Well, of course the Fenton plant had a production of approximately half a million barrels, and then it was later augmented, the general production with the Bay City plant bringing it up to potentially 1,200,000 barrels, but conservatively speaking, say a million barrels of cement, all of which was built up from practically nothing. I do not think we could have gotten $25,000 for the original plant at Fenton.

By Mr. Wooden:

Q. Do you mean to say that when the new plant at Bay City was built, that the capitalization was not increased?

A. No, it was still retained as half a million dollars.

Q. Will you put that capitalization in terms of per barrel unit capacity?

A. Well, the comparison would be that of half a million barrels at the start.

Q. What would that be,—a dollar a barrel?

A. That would be a dollar a barrel, yes. Then you come up to the million barrel capacity, that would
502 be 50 cents a barrel, wouldn't it? Or less if it ran over the million, which in some years it did.

Q. It was over?

A. It was over a million barrels shipped. That is a matter of record with the government. I remember making out those reports on our shipments, and on our mill prices and so forth, and we always had pretty good shipments.

504 Q. Now, will you answer the question? Have you had any knowledge as to the capitalization of the competitors of the Aetna Company with relation to their productive capacity?

A. Well, I do not recall any company that had the low capitalization that we had. There is a plant
505 down there at Coldwater—it seems to me their capitalization was a million and a half, I believe, and of course the Peerless plant—

Q. (Interposing) What was their capacity?

A. The capacity of the Wolverine plant dwindled down to about a half a million barrels of cement.

Q. And what about the other one?

A. The Peerless Company had a capacity of probably

a million and a half after the two plants had closed down that they started up with. But I would say in answering your question—

Q. (Interposing) What was their capitalization?

A. Peerless had a capitalization, I think, of around close to $3,000,000.

Q. How were the sales of your company handled? I mean, did you operate a force of salesmen or was it handled in any manner different from the other companies?

Mr. Leisure: May we have the date fixed again, please, in the question, otherwise I object to the question.

By Mr. Wooden:

Q. Make it specific as to time, please?

A. Well, at the start, the sales were handled by me in the capacity of sales manager and salesman and everything, and I had one man that was working on a part time basis for me in the State of Michigan, working what we call the thumb of Michigan, the little country ter-
506 ritory up north of the Saginaw and Port Huron.

Q. Outside of that, you did not have any salesmen?

A. No. Then later on it was really necessary for me, with due respect to the wonderful following that I had created of friends and customers, because of the development of this company, it was really necessary to augment our sales force a little, so I did put on another man, making us one and a half. Then finally, after the Bay City plant got developed, I put on another man.

Q. When was the Bay City plant developed?

A. What did you say?

Q. When was the Bay City plant developed?

A. That would run about ten years ago, I believe.

Q. What was the largest number of salesmen you ever had?

A. So the largest number at our full speed ahead was three men,—two and a half men,—one man giving part time to the operation.

Q. Was your sales force substantially smaller than that of the other cement companies in your locality?

A. Well, I think without a question of doubt, there was not a company in the country that could match the small number of men that we had by anywhere near that.

Q. What was your cost of selling per barrel?

A. Our cost of selling per barrel was low. I would

approximate around 4 or 5 cents a barrel, which
507 should probably show a selling cost of about 10 cents over what would be the average.

Q. Did you discuss selling costs with competitors and know what their selling costs were?

A. No, I never had done that.

Q. What is the basis of your statement that the average was around 10 cents?

A. Well, I have heard that remark,—I have heard that remark, well, the last time I heard that remark was at the Cement Association meeting, the general meeting open to the public down in New York, and I think that that statement was made that the average was 17 cents.

Q. When was that?

A. Well, that was two years ago,—two years ago in May, I believe.

Q. When you say the Cement Association, do you know the exact name of the organization you have in mind?

A. Well, the Portland Cement Association.

Q. Is that the one with headquarters in Chicago?

A. Chicago, yes.

Q. Did the Aetna belong to that organization?

A. They did.

Q. Have you explained all of the reasons why your selling cost per barrel was so low, and the fact that you had a limited sales force? Is there anything else?

508 A. Well, not throwing any bouquets at myself, right now I have to do it to a certain extent, and I will say in answer to your question, the truth of the matter in that particular thing, and it is a bouquet to me, because of my personal ability in the development and the loyalty of the friends that I had established, plus the efficiency too that I had established in the method of distributing Aetna cement, which was a darn good cement.

Q. How near to capacity did you run your plants?

A. Well, the last five years I was there, during the so-called depression, they ran about 70 percent. I think the average was about 800,000 for many years. That would be a little better than 70 percent.

Q. During the depression you say?

A. Yes; the last five years they had that average.

Q. Do you know what the percentage of production of the other concerns was at that time?

A. The percentage of production, although I never bothered much about it, a lot of red tape and details, only now and then I would keep in touch with current things, but I do know that the percentage of production at that time prevalent was between 20 and maybe 24 percent. Usually, I think around about 23 percent of production; shipments.

Q. Were you extending your sales territory during the depression?

509 A. I did that.

Q. First state what your sales territory was and what extensions you made of it?

A. Well, of course, the first territory that was in the vicinity of our plants, was in the State of Michigan, and then I developed water transportation and the trucking of cement, and commanded a better business in Michigan, because of boat transportation to Grand Haven, Michigan, and from there we trucked cement to Grand Rapids and Kalamazoo and it put us better on the map—that efficiency—so that we automatically commanded an extra tonnage, and then I thought of the opportunity of developing in the Upper Peninsula and in Wisconsin, because the price seemed very attractive up there, and the demand seemed to be very good.

Q. You delivered to those territories by boat?

A. By boat.

Q. From Bay City?

A. From Bay City.

510 Q. Did you get down into States to the south of Michigan?

A. Got down to Toledo, Cleveland.

Q. Also by boat delivery?

A. By boat delivery.

Q. How about Indiana?

A. Indiana was rail shipment.

Q. But you did get into Indiana?

A. By rail shipment?

Q. Yes.

A. Yes.

The witness identified Com. Ex. 17 as a map he prepared showing the distributing points of Aetna for the special purpose of showing the water distribution and the possibilities of getting cement more efficiently to destinations

511 by truck. He said it was pretty hard to remember whether it was three or four years ago that he pre-

pared that map. The location of the distributing warehouses employed by Aetna were Detroit, Cleveland, Toledo, Port Huron, Michigan, Bay City where the Aetna plant was located, Grand Haven, Michigan; Menominee, Michigan; Green Bay, Wisconsin; and Racine, Wisconsin. At one time Aetna had a place at Sault Ste. Marie, Michigan.

Mr. Wooden: I offer the map which has been numbered Commission's Exhibit 17 for the record.

Examiner Norwood: Show it to counsel.

Mr. Leisure: No objection.

(COM. EX. 17 was offered and received in evidence.)

By Mr. Wooden:

Q. About when was it that you established these so-called distributing warehouses that you named?

A. Pardon me. You say when did I establish them?

512 Q. Yes.

A. Well, at times that I thought were opportune to the occasion. We first started at Detroit.

Q. When?

A. Well, as soon as we got our boat ready, that was the first stop.

Q. Can you approximate the time?

A. Well, I imagine seven or eight years ago. My memory is a little bit hazy on that.

Q. About 1930, would you say?

A. Yes.

Q. All right. That was the first one?

A. The first one.

Q. Then the others came along?

A. Then the others came along as I thought best.

Q. And the last of those was when?

A. Detroit was before that, I think.

Q. The last one established on the map there was about when?

A. The last one established was one of the Wisconsin-Michigan group. I say that because we operated under a very efficient company there called the Limestone Products Company with the main office at Menominee, and that operation started, I think, about five years ago, and I think it was only the third year that we finally got down to Racine, because it became a very nice operation, and Racine

513 was the last warehouse.

Q. What was your practice or policy in selling to

retail dealers at that time, with regard to how you arrived at your prices?

A. Well, our policy was to take care of our particular trade, or family, as we developed it, in the best way that we could with respect to our own cost, in competition. The prices varied.

Q. Did you quote your trade, commercial trade, on a delivered price basis?

A. Most of the time. At one time we were giving a so-called trucking allowance, but I believe that was eliminated. I know it was eliminated. The trucking allowances there, when they came to the mill or warehouse to get the cement is what I mean.

Q. When you quoted on the delivered price basis did you use any basing points that were in effect at other mills?

A. Only to the extent that it would better help me get a general analysis of the particular situation. I was interested at that time in just finding out what competition was doing and what I would have to do to command that particular business.

Q. You mean after finding out what competitors were quoting at a given destination that you used that as a basis for quoting less sometimes?

514 A. No, I would not say that. I always had pride in our product. While I never favored exorbitant prices I never became what you call a chiseler.

Q. Was it your aim and policy then to, in general, meet the delivered prices of other mills but not go below them in sales to dealers?

A. Well, to the dealer trade I might say that that was prevalent, that we sort of followed the trend of the market, when it fluctuated a little bit, but we always were independent, because that was my job, and I did it. I did not care whether it was Universal or Lehigh, or Huron, it did not make any difference what some other company was quoting. I used my own head and judgment as to what prices we would quote.

Q. Sometimes you were below the other and sometimes the same?

A. Sometimes, yes, and then I had the economic advantage too, which I thought I was entitled to, to make better deliveries in the territories on account of water transportation and trucking delivery, and I could give service.

Q. Did you figure your delivered price to your distribu-

tors around the Lakes on the basis of the water transportation costs or on rail transportation costs?

A. Well, we based our operation naturally on the attractiveness of the situation, the locality, and as to
515 prospects, as to the price return, and as to the tonnage involved.

Q. When you speak of price return what do you mean?

A. Well, the price return at our mill.

Q. After deducting transportation costs?

A. Yes.

Q. The mill net, in other words?

A. The mill net.

Q. I still do not understand whether or not your delivery by boat enabled your customers taking delivery by boat to have their cement delivered to them at less than though they had taken it by rail.

A. Well, I might better explain that. Our customers did not, with only one exception—we did sell one customer in Milwaukee I believe by boat and then discontinued that, but our customers bought from our warehouses. Our warehouses were really operated by us, with the exception of the Limestone Products Company, which was and is, I believe—

Q. (Interrupting.) Did you sell some dealers by quick delivery by boat?

A. We sold one dealer in Milwaukee a boatload of cement.

Q. That is the only one?

A. That is the only one I can recall, because the idea was to distribute this cement through our own warehouses, and the Limestone Products Company in Wisconsin operated practically as our own company, and was very ably operated too.

516 Were other companies using this warehouse method of delivery that you speak of?

A. Yes, only in a different form. The form that was prevalent among the other companies, and is today, is the shipping of cement by boat, which necessitates a silo at the destination and an expenditure of money for making it permanent, whereas ours is a better system and I would say a rather unique system, because it gave us elasticity of operation that the boat carriers did not have, and furthermore it allowed the same boat to come back on the return trip picking up stone or coal.

Q. Were you the first company in your vicinity to adopt that method of delivering by boat?

A. Successfully I think we were.

Q. Others soon took it up?

A. Others had delivered cement by boat, and they would swing it off, you know, very inefficiently. That has been done, but I do not think even today anybody is shipping cement in package form by boat and using a permanent conveying system.

Q. Who were your leading competitors in the sales territory where Aetna operates?

A. Well, first of all I would consider the Huron Portland Cement Company and its associated Company, the Wyandotte Company controlled by Mr. S. T. Crapo, as the leading competitor in Michigan.

517 Q. When you say "controlled" do you mean owned or controlled?

A. How?

Q. When you say Mr. Crapo controlled, what do you mean?

A. As far as I could see Mr. Crapo was the guiding genius of those particular companies.

Q. In charge of distribution matters?

A. Yes, sales distribution.

Q. All right. What were the others?

A. Well, then in Michigan was the Petosky Company and the Peerless Portland Cement Company, the Peerless Egyptian it was before it was Peerless, and the Wolverine, and there was a plant in Cement City known as the Peninsula plant, later taken by the Consolidated Cement Company. I do not know whether that is running now. Then the Alpha plant, and that went out of existence. Then the Newago, and that later went out, and of course the Huron and Wyandotte Companies. Then came Mr. Henry Ford with a little production down in Detroit; the Ford Motor Company.

Q. Did you mention the Petosky plant?

A. Yes, I did.

Q. By whom was that operated?

A. Well, the Petosky is now operated, I believe,—it was the last time I was in the cement picture,—by the Medusa chain of plants.

518 Q. And what company operated the Peerless plant?

A. First the Peerless Egyptian Company. Years

ago it was the Peerless Company at Union City, and then the Egyptian plant was started up and merged with the Peerless plant, and then they in turn built a new plant at Detroit, Michigan, and also a plant at Port Huron. It was called then the Peerless Cement Company.

Q. Was that operated by the Bessemer Company?

A. At one time the Bessemer interests came into operation, I think, of the Peerless Company by buying out certain stockholders.

Q. Did the Aetna Cement Company at any time during your salesmanagership maintain a membership in the Cement Institute?

A. Yes, we did.

Q. Will your state during what period?

A. Well, it was that period prevalent around the code time.

Q. And how long did it continue that membership, as far as you know?

A. Well, as far as I know it continued until—well, after the code went out, about two and a half years ago I think the Aetna Company dropped out of the Institute, two and a half to three years ago.

Q. Do I understand that prior to the code the Aetna Company did not have a membership in the Cement Institute?

519 A. I think I am correct in saying they did not.

Q. Did you resign your position as salesmanager, Mr. Cree?

A. No.

Q. Will you state just how you ceased to be salesmanager?

A. Well, I was all of a sudden—Peggy told me I was not wanted.

Q. Who do you mean by "Peggy"?

A. Pardon the expression, but all of a sudden I was told I was not wanted just like that (snapping fingers).

Q. By whom?

A. By Mr. Johnson, the president of the company. I asked him the reason and he told me for the better interests of the company. That is all he would say. He wanted me to resign. I would not resign so I thought after 26 years I at least deserved a darned good firing, so that is what I got.

Q. How much notice did you have?

Mr. Leisure: Now, if the Court please, I object to going into all this. It is not material to any of the issues in this case. It is incompetent, irrelevant and immaterial.

Mr. Wooden: It will be shown to be material.

Examiner Norwood: Objection overruled for the time being.

By Mr. Wooden:

Q. How much notice did you have of your discharge?

520 A. Well, I was called into his office, that he was occupying in our offices, and was told to sign on the dotted line, to resign, and I could not believe it, but it finally did hit me that he did want me to resign, and I refused to resign, so it happened just like that (snapping fingers).

Q. As to Mr. Johnson, where does he make his headquarters?

A. Well, he did make his headquarters and lived in Boston.

Q. Did he frequently come out to the Detroit office to go over the business matters there with you?

A. Well, not frequently. At least once a year. Later on, in the last few years, he was out a little oftener, though.

Q. On the occasion of your discharge did you know that he was coming out?

A. I did.

Q. How did you know?

A. I called him up and asked him to come out.

Q. Why did you ask him to come out?

522 A. Well, things were getting rather unbearable. I wanted to find out just how far I could go with authority, to better enable me to carry on what I thought the proper policies of the Aetna Portland Cement Company.

By Mr. Wooden:

Q. Was there some particular lot of business, or piece of business that was in issue at that particular time?

523 A. Well, while it was of a general nature, and I might say malignant growth, there was one piece of business, I believe it was down in Indiana, that there was some disturbance over. That had something to do with the Farm Bureau, if I remember, at that time.

Q. Do I understand that you wanted to discuss that particular piece of business with Mr. Johnson?

A. Well, that was one of the details of what I wanted to have as a general discussion for what I thought the better protection of the Aetna Portland Cement Company.

Q. What was this Indiana Farm Bureau business that you referred to?

A. Well, there was a discussion as to whether we should ship cement to the Farm Bureau at their various points.

524 Q. I am asking you with whom the discussion occurred, between whom?

A. Well, there was a discussion about this Farm Bureau shipment with a gentleman named Pearson of the International Cement Company.

Q. Who is he?

A. He was with the International Cement Company at Indianapolis.

Q. You said with Mr. Pearson. Does that mean that you were on the other end of the discussion?

A. Mr. Pearson came up to our office—

Mr. Leisure (interrupting): May we have the time fixed, Mr. Examiner?

Mr. Wooden: This was in the summer of 1936, if I 525 am not mistaken.

By Mr. Wooden:

Q. Is that right, this was just before your discharge?

A. Yes.

Q. The thing you called Mr. Johnson up in Boston about?

A. Yes. I had the man—

Mr. Leisure (interrupting): Now is Mr. Wooden's testimony correct or is it not, that it occurred on the date he gave?

The Witness: The particular day or date I do not remember, but it was about that time. At that time I had our representative in Indiana come up and meet—

By Mr. Wooden:

Q. (Interrupting.) And who was he?

A. A gentleman by the name of Fuelling, Charles W. Fuelling.

Mr. Zimmerman: Will the Examiner pardon the interruption? Will you bring out, Mr. Wooden, please,—it is just a suggestion,—as to whether this witness had the conversation or whether it was told to him by his representative from Indiana?

Mr. Wooden: I am seeking to do that.

Mr. Zimmerman: Yes.

By Mr. Wooden:

Q. You say you had Mr. Fuelling come up?

A. I had Mr. Fuelling come up.

526 Q. And did you talk to Mr. Pearson and Mr. Fuelling?

A. I talked with Mr. Pearson and called Mr. Fuelling in to be there at the source of the conversation so that I could better analyze the general condition.

Q. Well, what was the substance of that conversation with Mr. Fuelling and Mr. Pearson?

A. The subject?

Q. The substance.

A. The substance was bearing on the point that we should not continue to sell this Indiana Farm Bureau, only at a few particular points where they were classified as so-called dealers, or something like that.

Q. Did you reach any understanding as to what you would do about selling the Indiana Farm Bureau?

A. Well, it was just suggested that—

Q. (Interrupting.) By whom?

A. Mr. Pearson suggested that there were three distinct towns and we should not sell to anybody else. I asked him what constituted a dealer in the four corners of the country; that I sold a lot in Michigan that were running elevators and carried cement and sold this product to both types in Indiana if the demand was there, and we always carried a supply measured with that particular demand. I was backed up by Mr. Fuelling who said he thought it was all right to sell the Farm Bureau. That 527 was one of the things that I did want to talk to Mr. Johnson about.

Q. Did you and Mr. Pearson reach any understanding as to what should be done?

A. Only that it was, I might say, thrown in my lap that I should adhere, and Mr. Fuelling in turn should adhere to the three protected towns mentioned as being so-called classified for country distribution.

Q. And did you give Mr. Pearson to understand that you would sell only at those three points to the Indiana Farm Bureau?

A. No.

Q. What were the three points and who said that those were the three points that the sales might be made?

A. Of course we sold a lot of cement, we had a lot of small points around, and it is just a little hard to remember, but it seems to me one point was Peru, Indiana, and —I can not remember the other two.

Q. Notwithstanding that conference with Mr. Pearson and Mr. Fuelling were sales later made to the Indiana Farm Bureau at other points than those three?

A. Yes.

Q. How did that come about?

A. Well, they demanded cement and we shipped it.

Q. I am not clear yet as to who decided that those three points were the only points to which you should ship.

528 Who decided that?

A. Well, the decision, in the analysis of that particular situation, was given by Mr. Pearson.

Q. Do I understand that you then undertook to confine your sales to those three points, to the Indiana Farm Bureau, that by custom or otherwise sales were made at other points?

A. No, but I did realize that perhaps we would have to put a little effort in further developing this Indiana Farm Bureau, because we saw the potential possibility of a nice tonnage to the Farm Bureau down there, and we thought we would develop the shipping, to get away from criticism of course and the perfect pressure I was under, but we did ship to more than three points.

529 Q. What criticism or pressure do you refer to?

A. Well, that we should fold up and not ship from only those three points. That is the particular pressure.

530 Q. I will ask you if any one besides Mr. Pearson injected himself into that situation regarding the sales to the Indiana Farm Bureau Federation?

Mr. Leisure: And if so, when and what date and under what circumstances did they attend the meeting? I do not want these broad general questions that you get the same kind of answers to as the question itself. They are both improper.

Examiner Norwood: Read the question.

(The question is read.)

Examiner Norwood: I think that the situation locates it. Answer the question.

The Witness: What is the question?

(The question is read.)

The Witness: Well, there was Mr. Hogan of the International Cement Company.

By Mr. Wooden:

Q. What did he do?

A. He was responsible for having this man Pearson come up.

Mr. Leisure: I object to that answer and ask to have it stricken out as not being responsive. This wit-
531 ness cannot know whether or not Mr. Hogan was responsible for something or not. He can testify as to what he saw and heard.

Examiner Norwood: He might know that.

Mr. Wooden: I was just going to ask him how he knew it.

Examiner Norwood: Then you can cross-examine and show whether he does or not. Objection overruled.

By Mr. Wooden:

How do you know that Mr. Hogan was responsible for Mr. Pearson coming up?

A. Well, Mr. Hogan,—I met Mr. Hogan down at the cement meeting in New York, and this Farm Bureau evidently was quite—the thought was quite prevalent about the Farm Bureau buying cement from us, and he told me he was going to have Pearson come up to see me, and I think I was in town and I got a wire that Pearson was going to be in my office on a particular Monday, and that is the reason he was there.

Q. Did you discuss the Farm Bureau matter with Mr. Johnson when he came up at your request?

A. No, I did not discuss anything. I did not have a chance to.

Q. How long before Mr. Johnson arrived that you called him?

A. Mr. Johnson arrived, I believe, on a Sunday,
532 and I followed him I think on Wednesday—it was about four days after he arrived in Michigan that I saw him.

Q. How do you know he was in Michigan that time before you saw him?

A. Well, he called up the office and notified that he was in town and was going up to Bay City, and also that he had to see several parties around Detroit and other people in other places, and would be in the office, and later he came in on Wednesday.

Q. Do you know what other parties he saw?

Mr. Leisure: Now, I object to that.

The Witness: No, I do not.

Examiner Norwood: He can ask him that.

Mr. Leisure: I ask your Honor to instruct the witness to confine it to his own knowledge. If he was present—I do not want hearsay.

Examiner Norwood: He asked him if he knew.

Mr. Wooden: He said he did not know.

The Witness: No, I don't know.

By Mr. Wooden:

Q. Will you describe just as fully as you can, everything that took place on the occasion when Mr. Johnson discharged you?

A. Well, I was in my office, and he came in and I think it was about two o'clock in the afternoon, and he called
533 me in this office that he was occupying and told me that for the better interests of the company, that he wanted me to sign that paper of resignation, which I did not sign. He further stated on my reluctance in thinking about signing that or not signing it rather, if I would sign it he would give me the three months' salary, and if I did not sign it he would give me only one month's salary. That is all that was said.

Q. You have gone over that before?

Mr. Leisure: I move to strike out both the question and the answer as being incompetent, immaterial, and irrelevant, and not within any of the issues in this case.

Examiner Norwood: Objection overruled.

By Mr. Wooden:

Q. Did Mr. Johnson give you any details as to why he was asking for your resignation?

A. I tried to do that. I mentioned the point, I said, "My God, I have been with this company for 26 years, and I certainly won't resign, and what is the reason for this?" He would not give me any reason, only a general reason

that it was for the better interests of the company, although I do remember that he flashed a letter at me quickly, and I saw the letter going by, and the letter was from Mr.
Crepo to Mr. Johnson, criticizing me for my activity
534 in Indiana, recent activity in Indiana. And the letter referred to the Farm Bureau or to some particular order or detail at that time that I don't know.

Mr. Wooden: I would like to ask counsel for the respondents the Huron Company and the Aetna Company to produce the letter that has been referred to.

Mr. Leisure: May I ask a question on the voir dire? When you say he flashed a letter at you, did he show you the letter?

The Witness: Well, like this (indicating), just like that (indicating).

Mr. Leisure: So from that flash you determined that the letter was criticizing you and who it was from?

The Witness: Yes.

Mr. Leisure: That is all.

536 Mr. Leisure: May the record show that the witness when asked the question as to whether or not he read the letter, drew his hand across his face in a motion from right to left, and let the record also show that from that testimony of the witness we are unable to answer Mr. Wooden's question that we produce a letter, because we do not know from that description either the date of the letter, the person that signed it, or whether or not there was any criticism in the letter, or whether there was a letter written at all.

538 By Mr. Wooden:

Q. Mr. Cree, do you stand by your description of the letter? Did you see it sufficiently?

A. I saw the letter very quickly. I might be flashing that way, but I can go even more minutely. The letter stated that on account of this Indiana case, that I should have known by past experience—and the letter was flashed like that—he might have hesitated a little bit, that I did see that, but I did see that—that I should have known better, and something about making our big brothers and little sisters—

Mr. Leisure: (Interposing) I object to this sort
539 of testimony, and I submit to your Honor that it must be apparent to your Honor that this witness could

not possibly have known the things that he is now attempting to testify to orally, from the description in which he saw the letter. Now, I ask your Honor to exclude that kind of evidence.

The Witness: I might have flashed a little bit too quick.

Examiner Norwood: You examined on the voir dire, as I understand it. Anyway, the motion is denied.

By Mr. Wooden:

Q. Was it a letterhead; was it on a letterhead?

A. It was a letter from Mr. S. T. Crepo of the Huron Portland Cement Company, and when I saw Mr. Johnson flash that, perhaps he did hesitate a little bit, although my eyesight is pretty good, but it was a flash like that, and into his brief case, and I thought it was rather unfair that I could not talk about it at least.

Q. Was there any reference made on that occasion to the number of friends you had in the industry?

Mr. Leisure: That question is objected to also as incompetent, immaterial and irrelevant and not within the issues of the pleadings.

Examiner Norwood: Objection overruled.

The Witness: Do I answer that?

540 Examiner Norwood: Yes.

The Witness: Yes, he did say at that particular time that I had a lot of friends, "but you have a lot of enemies." And that was surprising to me. But further discussion was simply out—that's all.

By Mr. Wooden:

Q. Did you understand from him in any way who your enemies were?

Mr. Leisure: Just a moment. I object to the witness' understanding. He can testify as to what was said to him and what he said.

Examiner Norwood: You can testify as to what you heard about it. Objection overruled. Confine that to your experience and what you found to be true.

The Witness: As far as having any enemies, I have a lot of friends. I know I have a lot of customers that buy cement and they are friends of mine, and people in business that sell cement if they are enemies, then I just feel sorry for them. I do not hold any hate for them at all; I just feel sorry that they don't know any better, and if that is the kind of enemy that I have, why, I have them.

By Mr. Wooden:

Q. Had you had prior to this occasion of the Indiana Farm Bureau dispute, occasions when criticisms over
541 other incidents had been brought to your attention by competitors?

Mr. Leisure: That question is also objected to.

The Witness: Yes, sir—

Mr. Leisure: (Interposing) Just a moment, please. That question is objected to unless the occasions are specified and the parties participating are specified in some way. Just a broad general question "Did you have other occasions" is objectionable.

Examiner Norwood: He wants to find out if there were any, and then possibly he can locate them. He can just ask one question at a time.

Mr. Wooden: It is a preliminary question.

The Witness: Yes. That is the terrific pressure that I personally was under.

Mr. Leisure: He is answering, you see, your Honor, just to the point of my objection. He is telling what occurred on occasions without specifying when they occurred or who the parties were. I object to the question and ask that the answer be stricken out.

Examiner Norwood: The motion is allowed as to the last answer there, but I shall ask you to answer the original question, and I shall overrule the objection of counsel for the respondent. Read the original question.

(The record is read.)

542 Examiner Norwood: Answer that yes or no.

The Witness: I said, yes.

Mr. Leisure: Does the answer stand that this was what the pressure was all about? Has that been stricken out?

Examiner Norwood: Yes.

By Mr. Wooden:

Q. Directing your attention to the bidding in which your company participated, in the spring of 1933 on the business for the Indiana Road Commission, did your company submit bids on that occasion?

A. We did.

Mr. Wooden: I should like to have these papers marked Commission's Exhibits 18-A, B, C, and D, for identification.

(The papers were marked "Commission's Exhibits 18-A, B, C, and D for identification.")

By Mr. Wooden:

Q. Had the Aetna Company filed a bid with the Indiana Road Commission prior to March, 1933?

A. Prior to March, 1933?

543 Q. Yes.

A. Well, if you refer to one particular letting that the Aetna Company finally received an order for approximately 150,000 barrels of cement, there were two bids filed by the Aetna Company.

Q. Will you state when the first bid was filed and what prices you quoted them on the first letting or the first bidding or advertisement?

A. If I remember, that first bidding blank came in—we received bidding blanks in previous years from them but had not bid, and I decided that we would bid on that, and I was home, I think I was laid up with the grippe or something, and I called up the office and talked to a young man I had there working trying to develop him to take a little responsibility to relieve me in the selling end of it, and I told him to quote prices down there and quote them on the so-called Wyandotte base.

Q. Wyandotte?

A. Wyandotte. When I got back to the office, I found that our bidding was approximately the same figure, and I figured out that the Wyandotte base should apply down there, working on the theory that a base should apply as far as its equalization point, and I thought that that was the proper base to apply, and he in looking it up had evidently grabbed off some points off the Wyandotte base or the equal of the so-called Toledo base, and then figured all

544 of the prices from Toledo and the other points that he had there in reference to that particular bidding, but I came down and I criticized him and I told him that he should have gone into it more thoroughly, that I felt sure that the Wyandotte base would apply down there with some of those towns adjacent to the Michigan-Ohio line, and so we had that opportunity to perfect our bidding according to my analysis and theory of bidding on the second letting, and it threw us low, to the extent that we received approximately 150,000 barrels of cement.

Q. Do I understand that on the first bidding, by using

the Toledo base, you made the same quotations to the State of Indiana that the other bidders made?

A. I am pretty sure that the price became equalized on all of the bids that were submitted.

Q. Showing you some papers marked Commission's Exhibit 18-A, B, C, and D for identification, I will ask you to state what they are?

A. That verifies, in detail, I believe, what I previously said.

Q. I did not ask you that. What are these papers?

A. I don't remember whether that was—I don't know in what communication question 6 was forwarded to my attention, whether it was from the Indiana Farm Bureau or whether it was from Mr. Johnson or somebody.

545 Q. Were these papers prepared by the Aetna Portland Cement Company?

A. There I see this (indicating). I did not notice that. Yes, they were.

Q. Were they in answer to questions asked by a representative of the Federal Trade Commission? Can you say that?

Mr. Zimmerman: I could not hear that question.

By Mr. Wooden:

Q. Were they in answer to questions presented by representatives of the Federal Trade Commission?

A. I cannot recall that unless it was from—well, it plainly says right here—(indicating)—"Mr. Johnson"—which is attached apparently in the office of the Portland Cement Company. Evidently he requested information on this particular Indiana letting.

546 Q. Is one of the papers signed by you?

A. Yes, that is my signature, and this one too (indicating).

Q. Will you then vouch for the correctness of the figures and statements made in the papers?

A. I would, on the theory that the figures are properly correct. The theory is expressed there and I imagine the figures are correct.

Q. You prepared them, or had them prepared in answer to a request of the representative of the Federal Trade Commission?

A. Yes.

Mr. Wooden: I offer them for the record, Your Honor, Exhibits 18-A, B, C and D.

Mr. Leisure: I assume that this will be admitted subject to the usual motion to strike if it is not connected up? That is, it is not binding on any of the other companies that are not named?

Mr. Wooden: It is just a statement of the Aetna's participation in that Indiana road bid of 1932 and 1933.

(COM. EX. 18-A to D was offered and received in evidence.)

By Mr. Wooden:

547 Q. Now as I understand it, Mr. Cree, that was the first time you had ever bid on the Indiana Highway Commission business?

A. I think that is correct, Mr. Wooden.

Q. Did any of your competitors ever discuss with you the matter of your having bid on that business?

Mr. Leisure: Now that question can be answered yes or no, if the Court please.

Examiner Norwood: Yes, answer that yes or no.

A. Yes.

By Mr. Wooden:

Q. Who, when, and what did he say?

A. Well, I remember Mr. Jennings of the Wabash Company making a statement about that.

A. And I think Mr. Fred Stone, I know Mr. Fred Stone called up and talked to me over the Telephone and criticized me for that Indiana letting, and he said he thought it had disastrous results, rather than having my theory of a basing point going as far as the equalization point. Did you hear that?

548 Q. How long after the bids were in did these conversations occur?

A. I am under the impression—I can not say whether it was before we got the contract, or our portion of that contract, or after, but I think it was after we had gotten the contract.

Q. Did Aetna ever establish a basing point price at its mills?

A. No.

Q. Was a basing point price ever established at Aetna's mills by anyone else?

A. There was a so-called Saginaw-Bay City basing point established by the Huron Portland Cement Com-
549 pany at Saginaw, when they came down and inaugurated their silo distribution there.

Q. When did that occur?

A. That occurred after this Indiana letting sometime.

Q. How long afterwards?

A. Well, I can not quite remember. I think within a year.

The witness identified Com. Ex. 19 A, B and C as papers written on April 11, 1933, very shortly after Huron established the base at Saginaw-Bay City. These papers constitute letters, one addressed to Mr. Crápo of Huron and one a copy of that particular letter. The "second one" is addressed to Mr. Rooney, sales manager of
550 Huron. Mr. Rooney got a copy of this letter and it was written in Aetna's office by Mr. Johnson. This "third thing" is the original composition of thought that established these letters. The "third paper" has Mr. Johnson's signature in his handwriting and the witness said he can read it. The date of these letters is April 11, 1933.

Q. Where did those papers, or how did those papers come to you, Mr. Cree?

A. How did they come to me?

Q. Yes.

A. Well, they came to my office and then they were given to the Government as we were requested and required to do.

551 Q. How did they get out of the office into your possession?

A. Well, when I was fired from the Aetna Company, the Saturday following the Wednesday of my kicking out, they had a meeting down there and there was a fellow named Sherry—

Q. (Interrupting.) Who had a meeting?

A. The Aetna Company had a meeting of their sales force and new manager. There was a man named Sherry that worked for them, he lived in Grand Rapids and on his way home he brought the trinkets and papers that I had in my office, which was an accumulation of stuff over almost the entire period—I should not say the entire period of 26 years, but the period that I was there, and consisted

of not only this stuff here but some very happy memorandums, letters and pictures, and so forth.

Q. And these papers that are marked for identification as Commission's Exhibits Nos. 19-A, 19-B and 19-C were among the papers that were delivered to you under those circumstances?

A. The drawers to my desk were always open, I never locked them, and the whole thing was cleaned out and brought home, and my wife took them and unpacked them and put them in one big carton, and I did not bother about it—it was nauseating for me to even look at the darn things.

Q. You said something about these particular papers being delivered to a representative of the Commission.

552 A. A representative of the Commission called at my house in Birmingham and asked me for any correspondence that I might have there, and I had it, and I thought as an American citizen that I should give him those things and respect his request, and so I did so.

Mr. Wooden: The offer is renewed.

Mr. Leisure: Which was the handwriting, Mr. Wooden, that you asked him about and the witness said it was the handwriting of Mr. Johnson?

Mr. Wooden: On the third page there.

Mr. Leisure: May I just ask a question?

Examiner Norwood: Yes.

By Mr. Leisure:

Q. Who is F. R. J.?

A. Well, that is Franklin R. Johnson.

Q. Franklin R. Johnson?

A. Yes.

Q. And was this memorandum a memorandum that was sent to you?

A. No, that was a composition from our own office typewriter that started those two letters there, or the letter and the copy.

Q. But these came from your desk?

A. How?

Q. I notice these letters are all copies.

553 A. They are copies.

Q. I was wondering how this memorandum came to your desk. You say these papers came from your desk. They are not addressed to you, are they?

A. Well, they were just there, that is all. I do not know how they came there.

Q. That is, these letters from Mr. Johnson to the other companies were in your desk, and this memorandum which is not a letter, which is a copy of a memorandum, that was in your desk also?

A. Yes, that was in my files when they came home.

By Mr. Wooden:

Q. They were copies of outgoing letters?

A. Yes.

Mr. Zimmerman: I will just take a moment of time in looking at these.

Examiner Norwood: Can you proceed with the examination while counsel is looking at them?

Mr. Wooden: I would rather not, Your Honor.

(Short interruption.)

Mr. Wooden: I will come back to it.

By Mr. Wooden:

Q. Did the Wabash Company about that time also establish a base at one of your plants?

A. Shortly after the Wabash Company established
554 a reduction in their particular base at Saginaw-Bay City.

Q. Which the Huron Company had initiated, is that right?

A. Yes.

Q. How much of a reduction was it?

A. Ten cents.

Q. As sales manager and an old cement man, what is the effect of a base price being established at another mill, at another mill's location than the one who establishes it?

A. Well, the one who is receptive of that reduction loses that particular amount of money. That has been my experience out of those cases, that if the prices are put in they will hurt somebody.

Q. Do you consider them retaliatory?

A. That is what I would consider.

Q. Have you talked with other men in the industry about such matters and know how they consider them?

Mr. Leisure: That can be answered yes or no.

Mr. Wooden: Yes.

A. I have had a conversation, yes.

Q. Will you say how your interpretation of that practice of establishing a base price at a mill other than the one that establishes it is regarded by others in the industry?

A. As retaliation?

Q. Just how it is regarded, based upon your contacts with others in the industry.

555 Mr. Leisure: I object to this witness telling how he regards things in the industry.

Examiner Norwood: The general attitude of the trade goes to establish that. I think that is all right. Objection overruled.

A. I would say it was base retaliation.

By Mr. Wooden:

Q. Is every mill's most profitable business that which is located nearest to its plant when it sells on delivered prices?

A. Yes.

Q. Does it then follow that to establish a base price at a mill point other than the place where the mill establishing it has a mill cuts into the most profitable trade of the other mill?

A. Yes.

Q. Does it or does it not result in requiring that mill to meet that price on all of its business?

A. It has, I think, always been, the meeting of the particular reduction that way.

Q. On all the mills business?

A. Where that particular base would apply, yes.

Examiner Norwood: That is, when they establish the base nearer than a former base was, is that when it cuts into your returns?

556 The Witness: When it establishes a reduction in that base price in your own backyard, that hurts.

557 (COM. EX. 19-A, 19-B AND 19-C was offered and received in evidence.)

559 Q. Who was Mr. Lingeman?

A. Oscar Lingeman, the general manager of the Aetna Company.

Q. Have there been at times, within your knowledge, Mr. Cree, occasions on which you participated in meetings or conferences with representatives of competitors to discuss competitive difficulties?

A. Yes.

The witness identified Com. Ex. 20A, B and C as a three page copy of a letter dated October 3, 1933 addressed
560 to Mr. Lingeman by a Mr. Johnson. He testified that the signature on the paper was that of Mr. Johnson and that he was thoroughly familiar with Mr. Johnson's signature. That paper was among the other papers that were delivered to the witness after his discharge. The original of this letter was sent in and several copies were made and sent around to Aetna's "two little salesmen", and the witness thinks that one was sent up to the plant. The witness received a copy of the letter and copies were made for the people mentioned therein. He was one of them "to put their John Hancock on as to their solemn promise to agree to this." He did not put his initials on this copy or on any other copy at the time. He
561 said that after his discharge he turned this letter over to a representative of the Commission.

Mr. Wooden: I offer the document for the record, Your Honor.

Mr. Leisure: May I just ask who it was that sent them around, Mr. Witness?

The Witness: Send what around?

Mr. Leisure: You said these were sent around to different people.

The Witness: Well, in reading it there you will find that answered perhaps more completely than I can give it to you.

By Mr. Wooden:

Q. In other words, the document names the parties who are to receive it?

A. Yes.

(Short interruption.)

Examiner Norwood: We are taking a considerable time in reading it. One of the counsel could pass upon them, could not he?

Mr. Leisure: There is no way to obviate it, Your
562 Honor. There are a number of independent counsel here and when an exhibit of this kind is offered I think we ought to have an opportunity to read it.

Examiner Norwood: I should think an objection of one is an objection of all.

Mr. Zimmerman: Yes, but one might have some in-

formation relating to the matter which another might not have, very naturally. It refers to a good many different companies.

Mr. Leisure: Without reading it, there is a general objection to it.

Examiner Norwood: You can get a copy and study it and disprove it and move to withdraw it, if you so desire.

Mr. Zimmerman: There is no objection to Mr. Leisure making his general objection now.

Mr. Leisure: We make our general objection that it is incompetent, irrelevant and immaterial. It should be confined to the companies and individuals named.

Examiner Norwood: Yes. All right.

Mr. Herschberger: Now, Your Honor, I think I want an opportunity on behalf of the Universal Atlas to see these various exhibits that are offered in evidence. While it does take some extra time I do not like the idea of
563 having anything go into evidence without having a right to examine it.

Examiner Norwood: It does not prejudice the rights of any respondent to have a general objection entered here and that, by agreement, is the objection of all.

Mr. Zimmerman: We are not satisfied with a general objection.

Examiner Norwood: Counsel has the opportunity at any time thereafter to move to withdraw them.

Mr. Herschberger: But we may not have the people available for cross-examination later. In other words, if we do not see these here we may not have the opportunity to ask questions on cross-examination.

Mr. Wooden: You can ask questions on cross-examination, surely.

Examiner Norwood: I do not think we should drag along and take the time as to the admissibility of the documents.

Mr. Wooden: It does not seem to me it should take so many considerations by so many counsel.

Mr. Herschberger: I have never heard of a case in which counsel did not have the opportunity to look at them when they were offered in evidence before because they were received. As a matter of fact we have many counsel and we ought to give them an opportunity to
564 examine them.

Mr. Wooden: I am not seeking to limit it, just so that somehow it might be arranged to shorten it.

Mr. Leisure: That could be done if the Government make copies and lets us look at them before they are going in. There are a number of defendants here and Mr. Wooden will have to take the responsibility for them, he included them in the complaint.

Examiner Norwood: Make your objection.

Mr. Wooden: We have got a duplicate of that one.

Mr. Zimmerman: If you have a copy that will help. It counsel can have copies of these made up, which he undoubtedly will have, and furnish us with copies we can save a lot of time.

On behalf of the Marquette Cement Manufacturing Company I wish to object, first, upon the ground that there has been no proper foundation laid for the admission of this document in evidence. In fact there has been none, except that it was found in the possession of the witness at his home.

Mr. Wooden: It bears the signature of the president of the Aetna Cement Company.

Mr. Zimmerman: Quite so. It shows that the president of the Aetna Cement Company had signed this carbon copy of some document. Other than that there
565 has been no foundation laid for it at all. We object on that ground, and we object on the further ground that there is no showing as to who, if anyone connected with Marquette Cement Company, had anything to do with the transaction, and that it could not, therefore, be possibly binding upon the Marquette Cement Manufacturing Company, or any other company than the Aetna, of which Mr. Johnson was president.

Examiner Norwood: Is that Mr. Johnson's original signature?

Mr. Wooden: I understood the witness to say so.

Mr. Zimmerman: That means nothing at all except that there was found in the office a memorandum signed by Mr. Johnson.

Examiner Norwood: That is adopted as the objection of other respondents, is it?

Mr. Leisure: Beg pardon?

Examiner Norwood: Is that the objection of the other respondents?

Mr. Leisure: Yes, sir. We make the same objection, and that it is incompetent, irrelevant and immaterial.
566 (COM. EX. 20-A, 20-B and 20-C was offered and received in evidence.)

Mr. Clark: My understanding is, Your Honor,—I want to see whether or not I am right,—that the companies that I represent have the advantage of the objection that was made by Mr. Zimmerman, to the same force and effect as if I urged it?

Examiner Norwood: Yes, sir.

Mr. Zimmerman: I think that goes to all companies. We perhaps can settle that, that all respondents have the advantage of any objection urged on behalf of one respondent. Is that correct?

Mr. Wooden: That is all right.

Mr. Zimmerman: That is correct, is it not?

Mr. Wooden: That is agreeable to me.

Mr. Zimmerman: So we will not have to be disturbed about that.

Examiner Norwood: Yes.

Mr. Wooden: Your Honor, I want to read this, not only for your information but for the record.

Examiner Norwood: All right.

Mr. Wooden: This letter is dated October 3, 1933, signed by Mr. Johnson, addressed to O. J. Lingeman, General Manager, Aetna Portland Cement Company, Detroit, Michigan.

567 Examiner Norwood: You are reading from Commission's Exhibits 20-A, 20-B and 20-C?

Mr. Wooden: Yes, sir.

"Referring to the conference which Harold Cree and I attended on Friday last, at which there were also present, Mr. Stone of the Universal Atlas Cement Co., Mr. J. B. John of the Medusa Company, Mr. Rooney of the Huron Company, Mr. Lucas of the Petosky Company, a representative from the Marquette Company, and later we called on Mr. Emil Stroh of the Wabash Company:

"It seems to me that the results of that conference should be a mater of record.

"1. We admit that we had made a blunder when we quoted on the Government—Muskegon and Holland, Mich. jobs, March, 1933, and I promised that this will not happen again.

"2. I did admit that while we quoted regularly on the Indiana letting in December, 1932, we did quote irregularly and different from the others in March, 1933, by using the Wyandotte base. The result of that bidding has been rather disastrous, as I see it.

"3. It was stated that the other cement concerns could never find out definitely just what we were doing, when they called us by telephone, and that our answers were evasive. My answer to this was that we will
568 tell them at all times how much a particular contract is for; and we are perfectly willing to tell them, if they inquire, at what price we took the order. Moreover, I stated that if we were in doubt or not clear what was going on or we sensed any trouble in the market, we would not hesitate to call up Mr. Rooney or Mr. Lucks, Mr. John or Mr. Jennings, or anyone else, and ask them about the situation, in order that we might know and not unintentionally tear down a situation. They stated that they would answer those questions promptly and freely, and we will do the same.

"4. As to the Milwaukee situation and Pipkorn, that was discussed and we agreed that we should not allow a jobber to buy a large amount of cement, with an idea that he could use it later on to burst open the market; if he did, then in the future we should be careful as to how much cement we sold him, and try to control the situation. I appreciate that when a man buys merchandise and pays for it, it becomes his own and we cannot very well tell him what he shall do, but we must try to prevent a condition of this kind again.

"5. We agreed that at any time, whenever we are going to enter a new territory, we would carefully survey and look over that territory, to find out what procedure should be followed, what the customs were in that
569 particular territory, in order that we might not knowingly tear down any price structure.

"So in summing it all up, I pledged my word and the word of the Aetna Cement Company that we would play the game one hundred per cent—there would be no deviation from this in any way; we would be regular in quotations, fair in speech, in impressions and innuendos, which we would expect others to be. With that general understanding, all trouble caused by chiseling will be eliminated, and we shall go on in a harmonious way.

"Now, having given my word to the above, and Harold Cree who was there (representing Oscar Lingeman, who was unable to be present) joined me in this solemn prom-

ise, therefore it seems to me that this should be a matter of record, to be read over carefully and checked by:

"Oscar J. Lingeman, General Manager
"Albert E. O'Neal, Auditor
"Harold S. Cree, Sales Manager
"M. Smullen
"Stanley Sherry

and I should like to have each one read this letter and after they have done so, put their initials opposite their name, so that I may know that each one has read it and is fully aware of what has been promised. I know
570 that the loyalty of you all for the concern is great, and the loyalty to me is likewise unquestioned. This, coupled with your own desire for better things for the industry and the Aetna Company, will cause you all to hold to the text and run true to form; and this I do say in all seriousness.

"I feel that the next two or three weeks are serious and crucial times with the entire cement industry.

"After this letter has been checked over, I should like to have you return it to me for my file, keeping the copy (which is enclosed) for yourself.

"Sincerely yours,
"Franklin R. Johnson,
President,
Aetna Portland Cement Company."

571 Q. Now, as I understand it, Mr. Cree, you were present at the meeting that Mr. Johnson describes in that exhibit?

A. Yes.

Q. Can you explain what the blunder was with regard to the Muskegon-Holland, Michigan job in March, 1933, that Mr. Johnson referred to?

A. Well, when we got those particular jobs over there, they were not very good big jobs, and the cement on that particular work would come from our Grand Haven warehouse, and these were bids to the government, and we were a few cents under. It is hard to recall all of those details, but I think that we allowed the government the testing, which amounted to 2 cents a barrel, or something. Or maybe it was the calculation of the so-called land grant rates, but we were under there a few cents and got that work.

Q. And that was the blunder that is referred to?
A. Yes.
Q. Well, Mr. Johnson promised it would not happen again?
A. Yes.
Q. What about this Indiana letting and the Wyandotte base? Have you already covered that in your testimony?
A. I think that has been covered.
Q. You were at this conference that is described?
A. Yes.
Q. Was the Indiana letting discussed at that conference?
572 A. Yes, it was in a general way.
Q. What was the substance of the discussion about the Indiana letting in March, 1933?
A. Well, it dwelt upon the fact—the main fact in that thing was that we should not have carried this Wyandotte base to its equalization point, that we should have applied the Toledo base.
Q. Was not it the generally understood practice that the sum of the lowest base plus the freight would determine the price at destination?
A. It evidently was not in that particular case.
Q. Well, I am asking you if that was the general practice of the industry?
A. It really has not been prevalent around Michigan, because it seems that these Michigan bases had been confined to Michigan.
Q. Do you mean to say that the Wyandotte base was recognized as not going beyond the southern boundry of the State even though it would have made the lowest complete price outside the State?
A. I do, because we came home with 150,000 barrels of pretty good cement.
Q. Do I understand that as soon as you got over the State line, that then a different base applied than the Wyandotte base?
573 A. That is correct.
Q. What is this situation in Milwaukee and Pipkorn that is referred to here under No. 4 in Mr. Johnson's communication?
A. Well, we sold—I went over to Milwaukee and met a very nice fellow there that was running—I believe the Needham Supply business in Milwaukee, Walter Meyers,

and we seemed to get along all right, and it was not long before I received an order from him for a boatload of cement.

Q. A boatload? How many barrels is that?

A. I don't know whether it was a complete boatload; I think it was. I think it was about 10,000 barrels of cement. I think it was an entire boatload. When he bought this boatload of cement, and he did pay for it, and very promptly, too—

Q. (Interposing) Well, what was the snbstances of the criticism about that transaction?

A. Well, it would dwell on the fact that we should not have sold this.

Mr. Leisure: Just a moment. Can we get this so that we can follow it? What criticism, and by whom, and when?

Mr. Wooden: Well, this was one of the subjects of discussion at this conference, and referred to under No. 4 of Mr. Johnson's letter, Exhibit 20-A, B, and C. I want to get a little clearer picture of the Milwaukee situa-
574 tion and Pipkorn which was referred to there. Has there been a ruling yet?

Examiner Norwood: Objection overruled and the witness will answer with regard to the statements made by the counsel there.

The Witness: Well, the objection was that we should not have sold that amount of cement to a dealer, and I think if I remember correctly, and I think I do, that it was not what he did, but it was the potential possibilities with that cement there, and if the market went up, he might have a cheaper price than somebody else, so it brings up the question of how much cement you should sell to anybody.

By Mr. Wooden:

Q. The objection was as to potentialities rather than actualities and the results?

A. I think so. I do not think there was anything wrong about that.

Q. Do you know who made any criticism about Milwaukee and the Pipkorn transactions?

A. Well, there was criticism, I believe, from everybody that was there.

Q. You do not have any particular individual in mind,

or any company in mind that objected to the Milwaukee sale?

A. I think the Universal and Marquette companies
575 were pretty much interested in that particular district, and I think there was criticism from them.

576 Q. Had you finished your answer?

Examiner Norwood: Read the answer.

(The answer is read.)

The Witness: Well, you can change that to, no. I remember there was criticism. I remember that.

By Mr. Wooden:

Q. Do you know who the Marquette representative was? Mr. Johnson did not name him.

A. I am fairly sure it was Mr. Hettiger.

Q. Who was he?

A. He was a representative of Marquette.

Q. Any official, or do you know his capacity?

A. He was the assistant sales manager or something.

The witness identified Com. Ex. 21 A and Com. Ex 21 B as a file copy of his outgoing letter to Mr. Fred Stone
577 of Universal Portland Cement Company. He believes that it was written in reference to this same particular meeting.

(COM. EX. 21-A and 21-B were offered and received in evidence.)

579 Mr. Wooden: Well, it is now received and I shall now read it:

"October 5th, 1933. Fred Stone, General Sales Manager, Universal Portland Cement Company, Chicago, Illinois.

"Dear Mr. Stone: I was very glad to have talked with you again the other day at the meeting with Mr. Johnson.

"I think the Aetna Company should be highly complimented as it certainly was an Aetna meeting. However, I could have easily spoiled this compliment to us, but did not choose to bring up any general discussion of the competition that we have been up against, so therefore, decided to hear from everybody as to what the particular complaint was against the Aetna Company.

"Previous to this so-called 'new deal,' the Aetna Company has been against some very extreme competi-
580 tion, all of which you are well acquainted with. In this period of extreme competition, it is a matter of record

that the Aetna Company played a square fighting game. It is also a matter of record that we have never retaliated against other companies. Our attitude was purely a defensive one and through all this period we sincerely regretted the terrible destruction of proper thought that prompted this ruinous condition.

"There is one thing that we can salvage from this period and that is the thought that should strike everyone as they pass by the many monuments of wasted tonnage. (Let us build our future principles protectively sound and permanent.)

"At this time I do not think it proper for us to devote much time to criticism, as I think it behooves everyone in the cement industry to put their shoulder to the wheel in the development of a sincere and permanent structure.

"The Aetna Company was criticized at the meeting on the sale of cement to a dealer in Milwaukee on account of the fact that this dealer took his paid for cement and sold it at a price under the wholesale market. This was plainly one of the unfortunate conditions existing in the cement industry. Also the leading up of block manufacturers
581 for 90 days (a great number are dealers) allowing this condition to prevail in several parts of the country. We have had considerable trouble in Detroit, much more than in Milwaukee, on account of our competitors loading up dealer block manufacturers for 90 days price protection. We have lost considerable dealer business on account of dealers being able to buy from other dealers possessed with this protection.

"Now from this should arise a condition that would have the cement manufacturers assume the responsibility of resale of their cement. I do not think that the cement manufacturers interest stops at the price to the dealers because the consumer is the more important factor when it is all said and done. The Aetna Company is going to take the step to be very inquisitive as to the proper selling price of their cement on the consuming market.

"There was also brought up at this meeting, mention of the old job at Holland-Muskegon. This bidding was the result of the competition existing at that time as it was a known fact that the Alpha Company was taking business from us on practically the same basis that we quoted this letting. However, this is over and the condition of Alpha and everyone else has been properly adjusted.

582 "We are very pleased to realize that we are doing business in Wisconsin through our fine distributor, Mr. E. P. Smith, located at Green Bay and Menominee. This gentleman is a business man of the highest type and understands thoroughly the condition of the cement business. Mr. Smith has done nothing that has not been in harmony with the present status of affairs in Wisconsin and you may be sure that this will continue. Anything to the contrary that you have heard is not correct, and if there is anything in the future that you are in doubt of, I would appreciate it very much if you would come to me first instead of going to Mr. Smith.

"When any of our competitors have called us for information in the past, they have always been advised as would be proper and fitting to their particular occasion, and I am very glad to realize that there seems to be the opportunity for a more frank discussion of vital things.

"As I have said before, we do not choose to bring up things that have happened since this 'new deal' such as the Huron Company's deliberate taking of the Detroit City business and the Huron Company's break down of the trucking structure on the Mercer job of 50,000 barrels, or the inability of all the cement mills to notify us of
583 reinstatement of old prices on the State of Michigan for 50,000 barrels—we would rather forget these things and go along assuming a moral responsibility to see that the other fellow got his just deserts, and so on this principle, I am going to attend a meeting Friday on trucking and which I hope will result in the development of the higher degree of trucking equalization.

"With best regards to you, I am,

"Yours very truly, Aetna Portland Cement Company, Sales Manager."

By Mr. Wooden:

Q. Did you get any reply from Mr. Stone that you recall?

A. I cannot recall if I did. I don't know.

Mr. Zimmerman: Pardon me, Mr. Wooden. This was during the code days?

Mr. Wooden: The law had been passed, but before the code.

Mr. Zimmerman: What was the exact date of the letter?

Mr. Wooden: October 5, 1933.

By Mr. Wooden:

Q. You said in the last paragraph of that letter I just read, Mr. Cree, that you were going to attend a meeting Friday on trucking. Did you attend various meetings
584 with competitors at which you discussed the trucking problem?

A. Quite some few, yes.

Q. Will you describe what occurred at any of those meetings, who were present, when and what the different points of view were and what the outcome was?

A. Well, there were several meetings on the discussion of trucking pertaining to different localities. One regarding the trucking of cement in the Upper Peninsula of Michigan, and there were meetings on the trucking of cement in the Lower Peninsula of Michigan.

Q. Did the Aetna Company have a policy regarding trucking that was different from the other companies?

A. Well, we had a policy as of a general nature that I applied the efficiency in trucking in points like Grand Haven that contacted the metropolitan districts of that shore, like Grand Rapids and Kalamazoo, working on the theory that if trucking was an efficient thing, we should try to maintain, not only maintain but to develop it, and further it is because of the fact further as to the distribution of cement to the consumer at a more efficient service, and of price.

Q. Was there any disagreement with that position on the part of others?

A. That was the contention of a lot of argument—

Q. (Interposing) Can't you answer my question?
585 You did not even answer the preceding one. You just went off into a discussion. I wish you would really make your answers more responsive. You did not answer my question whether the Aetna policy of trucking of cement was different from that of the other companies.

Examiner Norwood: You can answer that yes or no.

The Witness: In Michigan, it had the same policy of the other companies.

By Mr. Wooden:

Q. All right. How about outside of Michigan?

A. It developed that the trucking policy became practically universal under one plan in the other districts.

Q. Did you change your policy or practice with regard

to trucking at any time during these meetings or conferences that you say you attended?

A. Yes. Up in the Upper Peninsula, we came out with a trucking plan and filed it with the code authority, George Reiter, and he thought it was a pretty good thing and would kind of settle the trucking issue in the Upper Peninsula in Michigan, and later we came out with the revised plan. I remember that we did.

Q. Can you state when that occurred?

A. Well, that was during the code.

Q. I think the records will show that you are a little off on your date there, but we won't go into that right
586 now. I think the record will show that that was in November, 1935.

Mr. Zimmerman: I do not think that you should instruct the witness.

Mr. Wooden: I think the record will answer that question. Now I ask to have these papers marked for identification.

The witness identified Com. Ex. 22A, B and C as memoranda of a particular meeting on trucking at the Book-Cadillac Hotel in Detroit, Michigan, on October 24, 1933.

Mr. Johnson is the author of the memoranda. The wit-
587 ness attended the meeting and so did Mr. Johnson.

Com. Ex. 22B is a memorandum of the meeting. Com. Ex. 22A is a memorandum of the meeting of October 24, 1933, outlining a trucking proposition. Com. Ex. 22C is a letter by Mr. Lingeman of Aetna to Mr. Johnson regarding a telephone conversation on this trucking situation. These papers came from the files that were delivered to the witness after his discharge.

Mr. Wooden: I offer them for the record.

588 Mr. Leisure: Mr. Witness, were the memoranda prepared by Mr. Johnson personally, [illegible] you say? I am referring now to 22—

The Witness: (Interposing) There is so much of that stuff that is ancient history to a certain extent, I will have to look at it if you will pardon me. What was your question again, may I ask?

Mr. Leisure: I want to know who prepared the memoranda? I am now referring to the first one; I think it is 22-A for identification. Who wrote it?

The Witness: Well, Mr. Johnson wrote this confirming his telephone conversations to Mr. Lingeman of our office.

589 Mr. Leisure: And did he give you a copy of the memorandum when he wrote it, or did you see him write it?

The Witness: Well, he was in Boston and I was in Detroit. I could not see it very well.

Mr. Leisure: Then how do you know that he wrote it? Not the second one; just the first one, Exhibit 22-A.

The Witness: Well, of course I know that he wrote it. I did not see him write it because I was not in Boston.

Mr. Leisure: My question was, Mr. Witness, how do you know that he wrote it?

The Witness: Well, I would say from my general observation of the application of the little knowledge of the thing, that I could truthfully say that he wrote it. I did not see him write it though.

Mr. Leisure: You have not told me yet how you know he wrote it, Mr. Witness.

The Witness: Well, from my knowledge of the fact that at that particular time during that discussion.

Mr. Leisure: He was in Boston?

The Witness: Yes.

Mr. Leisure: And you did not see him write it?

The Witness: Yes.

Mr. Leisure: Well, yet you know he wrote it?

590 The Witness: Yes.

Mr. Leisure: Now, I am asking you how you know that he wrote it.

The Witness: Well, I am confident that he wrote that particular memorandum.

Examiner Norwood: Was it enclosed in any communication from Mr. Johnson which he signed?

The Witness: Well, it might have been at that time. You see, that was written to Mr. Lingeman and turned over to me and that is how I know that it came from him, but I could not tell you that I do know that he wrote it because of his writing it in Boston when I was in Detroit. I understand it thoroughly.

Mr. Leisure: What about the second memorandum? That is the memorandum that is not signed, isn't it? 22-B—and it is a carbon copy.

The Witness: Yes.

Mr. Leisure: Who wrote that?

The Witness: Well, Mr. Johnson wrote this. It says here: "It stands at this writing, 3 o'clock October 24"—

Mr. Leisure (interrupting): Do not read it into the

record, please, because it is not an exhibit yet. Just read it to yourself.

The Witness: Yes, he wrote that too. He com-
591 posed it.

Mr. Leisure: Were you present when he wrote it?

The Witness: I can not recall that I was, no.

Mr. Leisure: Then how do you know he wrote it?

The Witness: Because of the particular wording, for one thing.

Mr. Leisure: Just point out some wording and tell us what it is from the wording that causes you to know that he wrote it.

Mr. Wooden: Your Honor, may I say that regardless of such questions and such answers, the testimony of the witness as to the circumstances and the origin of these papers, being a part of his files and so on, in the regular ordinary course of business, are sufficient to make this document admissible without regard to the question whether he saw the author prepare them or not. He has testified he attended a meeting and Mr. Johnson attended a meeting, and this relates to the subject-matter of that meeting.

Examiner Norwood: I think it would be evidential if he would answer this question here as to Johnson's peculiar wording.

Mr. Wooden: I have no objection to his answering it at all, but I was just hoping to save time, because it is so obvious to me that regardless of that and sim-
592 ilar questions, that the documents are admissible on the basis of that statement.

Examiner Norwood: I do not feel completely satisfied of that.

Mr. Leisure: Will you just tell us how it is that you know that Mr. Johnson wrote this exhibit, this copy 22-B?

The Witness: Is that the first one?

Mr. Leisure: The second one.

The Witness: I can tell by the wording there. I noted in one paragraph there he speaks of the distributors and dealers, and that is one point, Mr. Johnson not knowing the cement game in detail, always got kind of mixed up on, and I know and I can say truthfully that I know, and I feel confident—I will put it that way—that he wrote that.

Mr. Leisure: I object, Your Honor, to Exhibits 22-A and 22-B, first on the ground that they are incompetent, immaterial and irrelevant, and upon the further ground

that no proper basis has been laid for offering these copies of memoranda into evidence in this case. The testimony merely shows that a group of papers was taken from this man's desk. It does not even show that he himself took them from his desk. From all that appears, this may be some memorandum that some-
593 one else in the office wrote, that had no connection with any of these defendants, and until they are better identified, I object to them as being offered in evidence against any of the defendants.

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595 Examiner Norwood: Well, unless something further appears in regard to those papers the objection is sustained. They are marked for identification Commission's Exhibits 22-A, 22-B and 22-C.

Mr. Wooden: Exception, and I will make further proof on that score, Your Honor.

596 Mr. Leisure: The part I objected to, Your Honor,—I did not object to this part yet (indicating), I had not gotten to that. This is a letter and I better not say I object to this 22-C yet. My objection went to 22-A and 22-B, which were merely memoranda.

Examiner Norwood: Well, is there further information to be given about the other?

Mr. Wooden: There can be, although I still maintain that the showing made is sufficient for their admission, there can be and will be, if Your Honor feels that way about it.

Mr. Leisure: The objection is sustained and it seems to me there is no need for further argument.

Examiner Norwood: Well, by agreement then the paper identified and marked as Exhibit 22-C is received in evidence as Commission's Exhibit 22-C.

Mr. Leisure: Some of the counsel have not seen it, Your Honor. We have not had a chance to pass them around.

Mr. Clark: If the Court please, if 22-C is being offered by the Commission against all the respondents, or if it is not being offered against the respondents
597 whose principal place of business is on the Pacific Coast, I would like to know at this time.

Mr. Wooden: Your Honor, in reply to that general question I would say that all testimony and all exhibits offered in this case are offered as being evidence to establish the general charges of the complaint, which includes the charge of conspiracy and combination between all respondents.

Examiner Norwood: Well, it is the understand-
598 ing that that evidence will not be considered against other respondents unless the connection shows concerted action and agreement, expressed, implied, and so forth. I shall overrule that objection to the admission of 22-C.

Mr. Clark: Might I say too, Your Honor, that for the purpose of protecting the record, if we should move hereafter to strike some of the testimony that is being admitted without having previously objected to it we might find ourselves in a very embarrassing situation of not having a foundation in the record on which to base it.

Mr. Zimmerman: On behalf of Marquette Cement Manufacturing Company I wish to adopt the objections and statements that have been made by Mr. Clark, and I would like to add to that that we have the further objection that a proper foundation has not been laid for the admission of the exhibit.

Mr. Smith: On behalf of the Huron I would like to enter the same objection that has been stated by Mr. Zimmerman.

Examiner Norwood: You mean it has not been properly identified?

Mr. Zimmerman: Were you addressing that to me, sir?

Examiner Norwood: You mean it was improperly
599 identified?

Mr. Zimmerman: I think so, yes; I think insufficient foundation has been laid for it under the rules of evidence.

Mr. Herschberger: I want to make that objection on behalf of Universal Atlas Cement Company also, that a proper foundation has not been laid and that the entire document, Exhibit 22-C, is incompetent, irrelevant and immaterial as against Universal Atlas Cement Company.

Mr. Zimmerman: With Mr. Wooden's indulgence may I again say that yesterday I thought we cleared up the matter of having objections made on behalf of any company, that it was to stand as objections by all the respondents, and I should not have made this statement

except that Mr. Clark's statement seemed to apply only to the Pacific Coast companies.

Mr. Wooden: I understood objections made by one respondent were good on behalf of all.

Mr. Leisure: It will save a lot of time if that is so.

Mr. Wooden: We put a stipulation on the record to that effect the other day, I thought.

Examiner Norwood: Well, this last objection puts the matter in a different light. I will have to ex-
600 clude it for the time being.

Mr. Wooden: Even Exhibit 22-C?

Examiner Norwood: Yes. It is not a signed paper.

Mr. Wooden: Your Honor, if you are going to take the position that every paper in this case has to be signed, it seems to me—you know that modern business is not handled that way. Filed copies of outgoing letters are considered everywhere as the equivalent of the originals in the ordinary course of business.

Examiner Norwood: You have to show where it came from.

Mr. Wooden: I did.

Examiner Norwood: You have got to show more than is shown in the record. Anyway, I have no choice in the matter.

Mr. Wooden: I did show where it came from.

Examiner Norwood: I do not think it should be given the dignity of evidence.

Mr. Wooden: This came from the files of this witness when he was salesmanager of the Aetna Cement Company, and the files were sent to him and kept in his possession after his discharge. The papers are accounted for as to where they came from. I maintain the very fact that papers of this sort are in the files of the respondent
601 company is enough to make them admissible.

Examiner Norwood: Yes, but that does not purport to be an original, and you have to give them time to produce the original.

Mr. Wooden: Well, Your Honor, there will be, over and over again, offers made of filed copies or carbon copies, or photographic copies of outgoing letters that are not signed, and if that is to be your position on that we might just as well have a showdown on it and go to the Commission.

Examiner Norwood: I can not pass on the others now. The circumstances may be different in the others.

602 By Mr. Wooden:

Q. I will ask you, Mr. Cree, to state of your own knowledge what the position of the Aetna Company was with regard to the matter of trucking, the position of 603 its competitors, as was brought to your attention regarding Aetna's policy on trucking in October, 1933?

A. Well, at that particular time, as I remember it, the Aetna Company's policy on trucking was well established among the dealer trade. In detail I might say there is a price delivered, the same as the car price. Shortly after discussions started according—

Q. (Interrupting.) Between whom? Discussions between whom?

A. The different cement companies.

Mr. Leisure: Now I would like to interrupt. I do not want him to tell us about discussions between various cement companies unless he identifies the people that he talked to. I want to preserve our objection to this general line of testimony.

Mr. Wooden: I would be glad to have him do that.

Examiner Norwood: Yes.

By Mr. Wooden:

Q. Be just as specific as you can, Mr. Cree, giving names and everything that you can. Do not give any generalities.

A. Well, there were trucking meetings on the thought of the readjustment—

Mr. Leisure: Now I object to giving conclusions as to what happened in general meetings unless we know when the meetings occurred and who attended the meetings, 604 and whether or not these respondents attended the meetings.

Examiner Norwood: I think we ought to let the witness tell the story here and then we will bring it out, then if it is not sufficient you can move to strike it. We are delaying the matter just a little. I think he better go on and tell his story.

The Witness: May I proceed now?

Examiner Norwood: Yes.

The Witness: Thank you. Well, the Aetna Company's policies,—I will restate it,—on trucking was that they had a delivered price the same or equal to the car price, and the efficiency, however, on the trucking, on account of the fact that the delivered price on trucks, which was the same

as cars, took the cement directly to the job, whereas cars in most cases went to particular sidings and then had to be re-trucked. That policy carried on for quite some time, and then outside car shippers were really instrumental in trying to—

Mr. Leisure (interrupting): If the Court please, I object to what outside car shippers were instrumental in doing. If this man knows of any conference that he had with such individuals we should have that, so we can have the opportunity to reach it in the proper way.

Examiner Norwood: Read the question.

605 (The question was read.)

Examiner Norwood: Read the answer of the witness.

(The answer of the witness was read.)

Examiner Norwood: Objection overruled.

The Witness (Continuing): —in trying to develop a plan of trucking that would equalize, according to their theory, the economic advantage that we held.

606 By Mr. Wooden:

Q. Whom do you refer to as outside car shippers?

607 A. Well, I refer to those companies who occasionally sold in the State of Michigan not by truck. Such companies like Medusa and Consolidated and Universal.

Q. All right. Just take that as an example. Be more specific hereafter instead of generalizing. Be specific.

A. It is pretty hard to be that way and rehash all that stuff.

Examiner Norwood: As much as you can.

By Mr. Wooden:

Q. All right, go ahead.

A. The car shippers tried to develop what they thought would be a better plan of trucking.

Q. Better than what?

A. Better than the plan which we had adopted, and the Huron Company, too. So, resulting from the application of the thought that occurred, came several meetings on trucking.

Q. Who attended such meetings?

608 By Mr. Wooden:

Q. What period of time are you talking about in this testimony now, Mr. Cree?

A. Well, the period of time would be approximately the date of this memorandum there, as of that particular meeting.

Mr. Leisure: Will you have the witness designate what memorandum?

By Mr. Wooden:

Q. Is that Commission's Exhibit 2-B for identification? Is that what you refer to?

A. Yes.

Q. All right. Now we have got that clear.

Mr. Zimmerman: What is the date?

Mr. Wooden: October, 1933. And for your information, I call your attention to the fact that an exhibit went in yesterday in which the witness wrote Mr. Stone that he was going to attend a number of meetings, and that was early in October, 1933. Meetings on trucking.

Mr. Zimmerman: Now, you will fix the date of the meetings?

Mr. Wooden: I will do the best I can. I do not profess to be able to perform miracles in fixing exact dates of this matters.

609 Mr. Zimmerman: Very nearly.

Mr. Wooden: I will do the best I can.

By Mr. Wooden:

Q. All right, Mr. Cree. Will you continue with your answer?

A. Well, I don't know what further I can say that started the development of meetings to change the idea of trucking that had been established by the Aetna Company, and you would say the Huron Company and some others down there.

Q. Did you attend such meetings?

A. I did attend a few of them.

Q. Can you state where and when any of them were held?

A. Well, at the Book-Cadillac Hotel in Detroit, Michigan, there was held that meeting there.

Q. Is that the one that is again referred to in Commission's Exhibit 22-B for identification?

A. Yes, that is the one.

Q. All right; did you attend any other meetings of trucking?

A. Yes.

Q. Where and when?

A. It is pretty hard to set the date.

Q. As nearly as you can? We do not ask you to perform miracles either.

A. I attended a meeting in Chicago. That was dur-
610 ing the World's Fair, because I knew I went through the French Village that night.

Q. Can you say about when that was?

A. Well, that was the first year of the World's Fair.

Q. I know, but that is a rather long period of time. What time of the year?

A. It was early in the fall or the late summer.

The witness identified Com. Ex. 23A and Com. Ex. 23B as a memorandum drafted by him about the second day
611 after his return from that particular meeting in Chicago. That was among the papers that were delivered to him at his house after his discharge from the company. The purpose in preparing the memorandum at that time was to keep a record of the progress of cement competition. The witness made that memorandum for his own benefit and for the benefit of Mr. Johnson, president of Aetna.

That particular memorandum was submitted to Mr.
612 Lingeman, the general manager, who in turn would send it to Mr. Johnson.

Mr. Wooden: I offer the exhibit for the record.

Mr. Leisure: No objection.

Examiner Norwood: Received as Commission's Exhibits 23-A and B.

(COM. EX. 23-A and 23-B was offered and received in evidence.)

By Mr. Wooden:

Q. Can you state who was present at this meeting in Chicago which you described in this memorandum?

613 A. Well, there was Mr. Rooney of the Huron and Wyandotte companies in Michigan. There was Mr. Charles Luck, the sales manager of the Peerless Cement Company of Detroit, Michigan, and Mr. Fred Stone of the Universal Company of Chicago, and J. B. Johns of the Medusa Company. Mr. Loucks of the Petosky Company in Michigan.

Q. Was any one there for Universal?

A. Mr. Stone of the Universal Company.

Mr. Hal Smith: What was the date of this meeting?

Mr. Wooden: He fixed it as near as he can in the early fall of 1933.

The Witness: And I am pretty sure that Mr. Colburn of the Marquette Company was there.

Mr. Zimmerman: Mister who?

The Witness: Colburn; is that his name? I remember having met him.

By Mr. Wooden:

Q. Would you say that this meeting in Chicago that you are referring to now was held before or after the meeting at the Book-Cadillac Hotel referred to exhibits 22-A and B for identification? I don't know that the document itself will help you, but can you answer the question on your own unaided knowledge?

A. The Book-Cadillac meeting came after that meet-
614 ing, I am quite sure.

Q. Now, I notice in your memorandum, in Exhibit 23 describing this meeting, you say:

"The Aetna Company was criticized on account of the fact that they had established the carrying of cement in package form to destination warehouses controlled by themselves and located at points where their competitors had not elected to establish silos. We claim that the destination price is the main thing to worry about and as long as the Aetna Company are meeting the destination price it is not unfair competition that they should have the privilege of any economical location that they have developed." Do you recall who made any such criticism that you state there in general terms?

A. I would state there that that was the consensus of opinion among what I termed our competition; all of them.

Q. You have no particular one in mind or a particular statement that was made on the subject?

A. Well, I would say all of them criticized that kind of an operation.

Q. You go on to say:

"If the Aetna Company did not choose to follow a leader and go to points like Milwaukee where there are millions invested in silos on account of this 'sheep running' proposition of following the leader, it appears to us that it
615 is the Aetna Company's business and no one else."

And you go on to say:

"It is a matter of record that the Huron, Universal,

Petoskey, Lehigh and other companies located advantageously for water shipment, have planned their water destination depots according to their own version of competition, and of course, upon their own initiative."

What was the difference between their system of water shipment and yours?

A. Well, fundamentally the main difference was that their shipments were by water shipment by boat of bulk cement, whereas our shipment was by boat carrying the package. In carrying it differently than I believe anybody else has done successfully, that is with a permanent boating system. There has been cement carried in packages—

Q. (Interposing.) What difference did that make as a competitive proposition?

A. Well, it would allow us greater elasticity of water shipment.

Q. How did it affect your cost of delivery by water compared with the cost of delivery by water of the other companies?

A. Well, I believe that the bulk shipment in the large boat that will cost a million or a million and a half and
carried 25,000 or 30,000 barrels, is a very economical
616 way of delivering cement, but the best we could do,
and we did it very well I thought, was to develop this package shipment, and realizing an elasticity of operation, and also—that is for the delivery of cement—and also I developed the thought at all times to create a return load for that particular boat, which on the bulk carriers I do not believe that is done. They go up or down loaded and come back empty. So all of that has a tendency to the investment they have on silos and all of that. The thing is almost equalized, and I don't know whether the bulk shippers with their bigger boats than we had and with their silo investments permanently located, have any advantage over the system that we were trying to plan.

Q. Was your system of water deliveries criticized?

A. It was.

Q. On what ground?

A. Well, there was the criticism, I remember, that inasmuch as we did not have silos, permanent silos, we should not ship cement by package form.

Q. Can you say who made any such criticism as that?

A. Well, it was a general criticism.

Q. Can you do any better than that? Can you give the names of anybody who made such criticism?

A. Well, I have heard J. B. Johns of the Medusa Company make that criticism, and I have heard Mr. Calvin
617 now of the Aetna Portland Cement Company make that criticism, too.

Q. And at that time, what was his position in the industry?

A. Who?

Q. Mr. Calvin. At the time he made such a statement.

A. He was—well, I guess he was sales manager—I don't know. I think he was sales manager of—of course, I know the company he was with; he was with the Peninsula Division of the Consolidated Cement Corporation at Cement City near Jackson, a little plant down there.

Q. And referring to the policies of Huron, Universal, Petoskey, Lehigh and other companies as to water shipment that I read a few minutes ago, you go on to say:

"Therefore, it seems fair that the Aetna Company should reserve the right to choose to pick their water destination spots on the basis of the best reflection on their own economic set up, and if they do not sell below their cost but do maintain the definite destination price, that they have a perfect right to become established on this basis of transportation."

Do I understand from what you said before that your equalization plan of trucking was so designed that it did not interfere with the destination price by rail delivery?

A. Well, originally our trucking plan was the same as the carload destination price.

Q. You mean the price delivered by truck?

618 A. Was the same as the car. But it did give us an economic advantage.

Q. By not putting it through the dealers' yard?

A. For several reasons. Because we were better on the job than a car shipper miles away, better service and smaller quantity.

Q. Wasn't that satisfactory to your competitors?

Mr. Leisure: This witness cannot testify as to what is satisfactory to his competitors, and I object to that. He can say what he did and saw and heard, but not what was satisfactory.

By Mr. Wooden:

Q. Was that fact brought out in any of these meetings that your plan for trucking did not interfere with the destination price by rail?

Mr. Leisure: I object to this constant leading of his own witness, putting the words in his mouth, your Honor. He can address the witness' attention to certain things, and then the witness can tell what happened at those meetings, but on direct examination, for counsel for the government to constantly put words in the witness' mouth in that way and suggest to him that those things might have happened, I think it is improper examination and I object to it.

Examiner Norwood: I do not think he is leading unduly. Objection overruled. Read the question.

619 The Witness: It was evident that our prices did not interfere with the rail price, that it was the same.

By Mr. Wooden:

Q. Notwithstanding that, was there still objection to your trucking plan?

The Witness: Yes, there was.

Q. By whom was objection made to your trucking
620 plan that you have just described? When and where and give us every last detail you can?

A. Well, I would think that would take me back to further statements. The objection came from—mostly from the so-called car shippers that were not set in an economic position as we were, and others.

Q. Have you named those so-called car shippers?

A. Well, I believe I did mention some of them.

Q. Do you want to name any others?

A. Well, I think I quoted the Universal—

Mr. Leisure: (Interposing.) We do not know yet, your Honor, when the objection was made, at what meeting, by what individuals, representing what companies.

Examiner Norwood: Maybe that will come out.

Mr. Leisure: Well, maybe it won't. I have been looking over the record, and have found instances where questions are framed which include one of the charges in the complaint, and the answer to the question says "Yes." Now, there is a finding of fact if your Honor so wants to regard it. I cannot wait and just hope that he will bring out the necessary questions later.

Examiner Norwood: You will admit that he has to bring out these facts one at a time, don't you? If we do not let him proceed, he won't get anywhere. Objection overruled.

621 By Mr. Wooden:

Q. Can you say whether that point was discussed at this meeting that you are describing, in Commission's Exhibit 23-A and B?

Mr. Leisure: And if so, by whom? Unless he can describe who discussed it, it is still objectionable.

The Witness: What is that again?

Mr. Wooden: I insist that it is not objectionable even then. But we will do the best we can. Repeat the question.

(The question is repeated.)

The Witness: What is the point?

By Mr. Wooden:

Q. The point as to whether your trucking plan did maintain or tend to preserve the destination price?

A. Well, our trucking plan equalized the rail carload price.

Q. You have not answered my question.

A. That was the destination price either by rail or truck.

Q. All right, but my question was—read the question please?

(The question is read.)

Mr. Wooden: And coupled with the preceding question, it was whether at the meeting described in this Exhibit 23-A and B, that point was made or brought out.

622 Mr. Zimmerman: If your Honor please, it may be that the witness knows what Mr. Wooden is talking about. I will confess that I am completely befogged as to what he is talking about, except that it seems to me that he is endeavoring to suggest to the witness that the general conversation at the meeting had reached certain conclusions which would be within the purview of the complaint.

Examiner Norwood: And I think that he is proceeding to give you a specific point of information.

Mr. Zimmerman: But it occurs to me that that puts the cart before the horse. I think what he ought to do is to ask the witness what was said at the meeting, and then what was said, and then you can draw your inferences from that. We do not usually proceed by saying, "Wasn't this the inference to be drawn," and then afterwards ask

what was said. I think he ought to exhaust the witness' recollection of what was said first.

Mr. Wooden: Here is a contemporaneous record made by this witness within a couple of days after the happening, made by him for the official use of his company and higher officials, and he makes statements in it on these subjects. That certainly entitles me to ask him anything regarding those matters.

623 Examiner Norwood: I think so.

Mr. Zimmerman: I have not any objection to his asking him what was said at all. That is the point. But he does not even know now what the month was—he does remember that it had something to do with going to the World's Fair, but that is as near as he can come to it.

Examiner Norwood: I think that he made that fairly definite.

Mr. Zimmerman: Not what was said.

Mr. Wooden: I am perfectly willing after he answers the question, to ask him what was said and who said it and everything about it. I haven't anything to hide. I wish I could get more details than I can.

Mr. Zimmerman: Then the way to do it is to ask for it, if I may suggest, instead of suggesting to the witness what the conclusions are that you wish.

Mr. Wooden: I did not ask him for any conclusions.

Mr. Zimmerman: I submit we might try the witness anyway as to what was said.

Mr. Wooden: I am not asking for any conclusions.

Examiner Norwood: Just make your objections to the questions and tersely state the grounds. That is what is required by the Commission's rules of practice. I shall be glad to discuss these matters off the record, I

624 should very much like to discuss every point of the case, but we are encumbering the record, and counsel for respondents have complained that the record is being enlarged and unnecessarily so. If you will cooperate, we can keep that down. Let us proceed and let the counsel go ahead with his examination, and let the witness tell us about this meeting.

By Mr. Wooden:

Q. Can you answer the question now, Mr. Cree, after all of these interruptions and objections and so forth, without having it restated?

A. Well, our trucking plan was—

Q. (Interposing.) Have you forgotten what the question was? I will ask you again, Mr. Cree, at the risk of making the record somewhat longer than it should be, whether or not the point that your trucking plan protected the destination price was discussed or brought out at this meeting in Chicago which you described in Commission's Exhibit 23?

A. May I look at this?

Q. Yes.

Mr. Leisure: May the record show that we have no objection to that question.

Mr. Wooden: It is the same question that has been asked and objected to over and over again.

Mr. Leisure: The record will show that, too.

625 By Mr. Wooden:

Q. Pardon me for interrupting, Mr. Cree. You have taken some time in looking over the paper. I am asking you for your independent recollection, if necessary refreshed by anything you find there, but I do not think it is necessary to read the whole paper to answer the question. Do you remember whether this happened?

A. I cannot recall.

Q. All right. Referring again to this Exhibit 23-A and B, in your memorandum you state: "Others have stated if we maintain and continue to progress along these lines"—referring to trucking—"that they will meet our competition in a like manner." Can you state who made any such statement as that?

A. I could not only to the extent that that criticism came from car shippers.

Q. Whom you have named?

A. Pardon me?

Q. Those whom you have named?

A. Any one of them would be apt to make a statement like that or maybe all of them.

Q. Well, what might be is one thing and what did happen is what I am trying to get at. You make the statement here that others have made that statement. I want to know who the others were?

626 A. Well, I would say the car shippers.

Q. You then commented in your memorandum Exhibit No. 23: "We think this is a fair and good competition, only hoping that if they do, they maintain the

destination price as we have maintained it." Were you making the statement about your maintenance of the destination price as something of a comparatively recent occurrence at the time you made it, or was it a long-established policy?

A. Well, it was quite a long-established policy with our particular company, because we figured if we met the car price by trucks, we had given the consumer enough advantage rather than to go further at a lower price.

Q. You state further: "We do not believe it fair to insist that we choke our operation of distribution, as our plant was built on the water to better enable us to compete with competitors who built similarly. If we stand firm on this, an accepted code would protect our interest." Did the code when it was adopted later, protect your interest in that respect?

A. As far as the destination price? I would say yes.

Q. As to your operation of distribution and building your plant on the water and so on?

A. Yes.

Q. That is what you were talking about?

A. It did.

627 Q. I note the last statement you made in this memorandum was this: "It is generally conceded now that Wabash has played the Aetna as an excuse for doing what they have done." What had Wabash done?

628 A. Well, that refers to the Wabash Company who were coming in, I believe, the southwestern part of Michigan where their freight rates were a little more advantageous to them than the eastern part, and they were bringing in cement in cars and then retrucking it and—well, we would say in the cement business they were rather unethical and really unfair to themselves in their thought, I thought.

Q. What do you mean by the expression that in the cement business that would be considered unethical?

A. Well, in any business, I would say, their method of distribution there.

Q. Why was it unethical?

A. Well, it seemed to be a method of discrimination in distributing cement.

Q. What do you mean by discrimination? Against whom?

A. Well, against the contractors and dealers that it involved. I do not mean other cement companies.

Q. Can you make that clearer? I do not just understand what you are driving at.

A. Well, their practice was rather in a discriminatory manner, as it was done at that time. I think that is what I referred to. It is pretty hard to remember all those things. I know at the same time that the Wabash Company put a lower price on the Bay City district, which was done to hurt the Aetna Portland Cement Com-
629 pany, from the evidence that one would gather at that particular time. That is probably what I refer to there.

Q. But this was a trucking proposition, as I understand it, following the shipment by Wabash at Bay City, is that right?

A. Bay City.

Q. What relation did this trucking in Michigan by Wabash have to the Bay City base established by Wabash? Did it have any relationship?

A. I think that all reverts back to the Indiana letting. The Wabash Company were rather peeved that the Aetna Company got some business down there, and then came a reflection of the Bay City base, as I recall, and other things that I term rather indiscreet competition, or unethical, you might say, along common-sense lines, and they were blaming the Aetna Company, and maybe that was their alibi in order to pick up some business along any lines.

Q. Was that a subject of comment or discussion at these trucking meetings?

A. I can not remember. It probably was to a certain extent, but I can not remember any definite discussion.

Q. What did you mean by saying it was generally conceded that Wabash had played Aetna as an excuse?

A. Well, it was the consensus of opinion there, I think.

Q. Consensus of opinion among whom?

A. Among the members attending at that meeting.

630 Q. All right. You just gave your conclusion about it being a consensus of opinion. Can you say what was said and by whom? In other words, I want the facts on which your conclusion rests rather than your conclusion. I wish you would just try to keep that in mind as much as possible.

A. Well, it all reverts back to that Indiana letting and the reduction of price at the Bay City base, and then the

operation of the Wabash Company in grabbing off some business here and there.

The witness identified Com. Ex. 24 A, B and C
631 as a file copy of a letter dated February 1, 1935 written by him to Mr. Johnson; Com. Ex. 25 A, B and C as a letter signed by Mr. Johnson in reply to witness' letter of February 1.

Voir Dire Examination by Mr. Leisure.

The witness testified that "this" is a carbon copy of the letter written by him in the regular course of his
632 business and that the letter he received is in reply to that letter, from Mr. Johnson.

Mr. Leisure: No objection.

(COM. EX. 24-A, 24-B, and 24-C and 25-A, 25-B nd 25-C were offered and received in evidence.)

By Mr. Wooden:

Q. Were these papers also, Mr. Cree, among those that were delivered to your home after your discharge?

A. Yes, sir, they were.

Mr. Leisure: Your Honor, I think the record is clear,—if it is not I would like for it to be so,—that when I do not object to these I am doing it on the basis of the understanding we had at the beginning that if these
633 documents are not connected up they are all subject to our motion to strike.

Examiner Norwood: That is correct. I think we are agreed on that.

Q. Now in this Exhibit 24-A, your letter of February 1, 1935, to Mr. Johnson, you describe your attendance at a meeting in Cleveland called by J. B. Johns, a meeting of District No. 3 augmented by the Michigan group. Then you say, "Mr. Rooney did not show up in Cleveland it developed in another meeting in Detroit yesterday," then you say "The object of the meeting was to attempt to bring back the Michigan situation to where it would be in tune with the other districts as it is generally conceded that it is a hard matter to keep localized the lower market."

What was the Michigan situation that was out of tune with the other districts?

A. The Michigan situation revolved around the
634 efficiency of truck delivery. It was different than the other district in that respect.

Q. Was that because of your policy, the Aetna Company's policy being different from that of others?

A. Our policy in Michigan was different than other policies in outside of Michigan.

Q. What do you mean by the statement that "It is generally conceded it is a hard matter to keep localized a lower market"?

A. Well, that statement was made after realizing the thoughts expressed by competitors that perhaps that lower market might go still further.

Q. Spread beyond Michigan?

A. Spread beyond Michigan.

Q. Does the trucking situation affect that?

A. It does.

Q. Will you explain how?

A. Well, the trucking situation in Michigan was different than at other points, and I think our competitors were afraid that we might work under the theory that we were entitled to give the same kind of trucking service in other ports where our boats would go.

Q. You say you think that. Now why do you think that?

A. Well, because we were always criticized for our boat operation.

635 Q. All right. You say in this Exhibit 24-A that the Wabash Company had been severely criticized for their operations in Michigan. What do you know about the criticism of the Wabash? By whom? Did you make any?

A. I can not remember of making any definite criticism. As a competitor my theory was to try to follow their operation to the best of my ability and protect my own particular company. I did not lose time in those things.

Q. Whom did you have in mind by saying the Wabash Company had been severely criticized for their operations in Michigan?

A. Well, I heard Mr. Calvin in the Consolidated Company criticize them.

Q. Where and when?

A. At that Cleveland meeting.

Q. Anyone else?

A. I can remember Mr. Johns criticizing them too.

636 Q. You go on to say in this Exhibit 24-B, referring to the meeting, subsequent meeting, the second one in Detroit, "The next factor that was brought up, and perhaps the most important one especially to us, was the matter of trucking, and it appears that there is another start from many discussions, of course on the theory that the destination price maintained is the main thing involved. The Aetna Portland Cement Company is in position to be not fairly criticized on trucking because we have maintained the proper plan." You then tell your president, "Our bigger competitors, however, are still, I might say, ganged up with high pressure against this company because of the fact that they realize that our elasticity of operation has given us more tonnage than they claim we should enjoy."

What was the basis for your report to your president that your bigger competitors were ganged up on you?

A. Well, the basis was the criticism that I always received when I would attend those meetings on trucking.

Q. You went on to point out how the Cement Institute had reported sales running around 23 per cent of capacity, the scarcity of tonnage, and referred to the rate at which you were running. At what rate were you running?

637 A. Well, the last five years of my history with the Aetna Company we averaged approximately 800,000 barrels of cement a year. At that particular year I do not know, but I would say around 70 or 75 per cent.

Q. You go on to inform your president, Mr. Johnson, "You know that will be called upon in an attempt to bring you in this picture. That I know is the policy that Mr. Johns is going to take, from his talk yesterday. Mr. Johns and his big interests are also, as he stated to Mr. Rooney yesterday, going to kick in the back door of the Huron Company." Where did you hear that statement made to Mr. Rooney?

A. I did not get that. Mr. Johns told that to Mr. Rooney?

Q. In your hearing.

Mr. Leisure: No, he is asking you, Mr. Wooden. He does not understand your question.

Mr. Wooden: Thank you.

By Mr. Wooden:

Q. Did you hear Mr. Johns make any statement to Mr. Rooney such as you described here?

A. Did I say that he made that statement to Mr. Rooney?

Q. "Mr. Rooney yesterday".

A. That he made the statement to Mr. Rooney?

Q. "Mr. Johns and his big interests are also, as he stated to Mr. Rooney yesterday, going to kick in the back door of the Huron Company."

638 A. May I see it?

(The document was handed to the witness.)

Q. Have you forgotten the question?

A. I realize the question now. I can not remember Mr. Johns saying that to Mr. Rooney, but I do remember that Mr. Johns did make that statement and I heard it.

Q. Was it at this meeting?

A. Yes.

Q. You informed Mr. Johnson also that, summing up what you say, "We are going to be pressed harder than ever before on our trucking, and it is the intention of others to force the Aetna Company to close up their operations at Grand Haven, Menominee and Green Bay." What is the basis of that statement?

A. Well, that was the truth, as I saw it.

Q. Based on what?

A. On the evident criticism of our particular operations at those points where we delivered our cement by boat and re-trucked it to our customers in what we thought was a very efficient operation.

Q. You then asked Mr. Johnson to please watch his step over the future developments, did you not?

A. I did.

Q. Now Mr. Johnson replied to your letter on February 4, Commission's Exhibits 25-A, B and C, in

639 one paragraph he says: "You may rest assured that I will watch my step and I will not get drawn into a whirlpool of arguments against you and Oscar and Albert when you are not around." Who are Oscar and Albert?

A. That refers to Mr. Lingeman, who was then General Manager of the company, and Mr. O'Neal, who was the bookkeeper down there.

Q. And Mr. Johnson also wrote you in this letter, "The last meeting I had with Mr. Crapo and Mr. Rooney

was to the effect that Mr. Rooney and Mr. Lingeman were going to get together and lay out some plan of disposing of our goods which will be fair and just and satisfactory to both. Beyond that I have not heard a word." Do you know anything about that?

A. Well, I remember it to this extent that at that time there were plans of distribution put out, the method of selling cement under the code, I believe it was, and there was not any distributing, or so-called marketing plan in the State of Michigan at that time.

640 The witness identified Com. Ex. 26 as papers composing one copy of a letter written by him to Mr. Johns, president of Medusa; Com. Ex. 27 as a letter from Mr. Johns in reply to witness' letter.

Mr. Wooden: I offer those for the record, Your Honor, as Commission's Exhibits 26 and 27.

Mr. Leisure: Subject to our motion to strike unless they are connected up with all the companies we have no objection, Your Honor.

The Examiner: Yes.

By Examiner Norwood:

Q. Do your include the bulk shipments in the term "trucking"?

A. Pardon me? What is that?

Q. Do you term it trucking?

A. Trucking, yes.

641 Q. Does that include shipment by boat as well as transportation by truck?

A. In our particular case I would say yes, because most of our trucking was done from boat warehouses.

Q. It refers to shipments by truck from the warehouses to the customer?

A. Yes, to the customer. Of course we trucked directly from our mills too, we had two mills, but we had more warehouses which were supplied by boat shipment.

Examiner Norwood: The papers identified by the witness may be received as Commission's Exhibits 26 and 27 respectively.

(COM. EX. 26 and 27 were offered and received in evidence.)

By Mr. Wooden:

Q. I notice in your letter to Mr. Johns you assured him that Mr. Johnson was behind you in anything that

you might do, and that he would be consulted on any important question that came up. In Mr. Johns' reply to your letter he said, or he refers to your letter and he says, "In our discussion at the Detroit meeting it was not my intention to take up any matters with our friend Mr. Johnson unless we were unable to settle the matters through the Detroit office." He also makes reference in this same letter to a committee that was
642 appointed by Mr. Calvin to work on the Michigan situation. What do you know about that committee?

A. Well, I remember that that committee was the result of the meeting mentioned here, and this fellow Calvin was appointed chairman of it.

Q. Who were the other members?

A. I do not remember.

Q. You do not remember any of them?

A. No, I could not say that I remember any of them.

Q. Do you know what the committee did, or what it reported, or anything about its work?

A. If I recall the object of the committee was to try to come out with a so-called marketing plan of distributing cement in Michigan, and also I think with an adjustment on the trucking plan that would better allow, would meet with satisfaction generally.

Q. What do you mean by a sort of a marketing plan?

A. The method of distributing cement to the consumer.

Q. What do you mean by "method of distributing cement"?

A. The description of the channels that cement should go through in reaching respective consumers.

Q. You mean as to whether some should go through dealers and others be sold direct?

A. That is it.

Q. Do you know what the committee did, what
643 report it made or what the results of its work were?

A. I believe that there was not any immediate result of that particular committee in coming through with any marketing plan.

Q. Did you send Mr. Johnson a copy of your letter to Mr. Johns of February 1, 1935? I am just asking you for your recollection. I am quite sure the exhibit that you are looking at will not help you.

A. Well, I notified Mr. Johnson of this either by independent letter or an independent letter enclosing a copy of this document.

Q. I notice in reply to you on February 4, in the preceding exhibit, I do not have the number right now, Mr. Johnson says, "'I note what you say about Huron and about Crapo and about Rooney, and all. I am with you 100 per cent and the letter which you wrote to Mr. Johns is quite correct.'' Mr. Cree, what reasons were given by any of your competitors for objecting to your trucking plan?

Mr. Leisure: What reasons were given? I think we ought to have something more specific than that in the question so that we can follow it.

By Mr. Wooden:

Q. Well, I will ask you first were any reasons given?

A. Yes.

Q. What were they and who gave them?

644 A. The reasons given were—

Mr. Leisure (interrupting): I would like to have the date.

Examiner Norwood: Who gave the reasons, first.

Mr. Leisure: And when, if Your Honor please. It is important.

Examiner Norwood: Yes.

Mr. Wooden: It is impossible for any witness to fix the exact time on something like this. It happened several years ago.

Mr. Leisure: I do not ask him to be exact.

A. Mr. J. B. Johns always criticized that, for one, and Mr. Calvin, and in places where the Petoskey Company were not trucking and shipping in cars, why, they criticized, and so did the Universal, and so did the Marquette.

By Mr. Wooden:

Q. Now did they give any reasons for their criticism?

A. The reasons were based on the fact that we held an advantage, and I always worked on the theory that was our economic advantage and we were entitled to it.

Q. Well, what advantage did you hold if your plant was so arranged as to protect the destination price by rail?

A. We held the advantage of the efficiency, I believe, of truck delivery.

Q. Did your plan of trucking operate to pass on any of the benefits of trucking to the ultimate purchaser?

645 A. Not in all cases, in price. We tried to maintain a price that was competitive with our competitors who were shipping in carload lots, but we did offer to our localized customers around our warehouses that efficiency that we thought, and I believe we thought right because we developed a nice business as friends, that efficiency that became trucking.

Q. Well, were there some instances in which the destination price was affected by your trucking plan?

A. Perhaps so. I do not recall any particular one.

646 The witness identified Com. Ex. 28-A, B, C and D as a letter written by him in the ordinary course of business to Mr. Lingeman who in turn sent it to Mr. Johnson. The letter was written as the result of a request from Mr. Johnson. It was addressed to Mr. Linge-

647 man because the letter from Mr. Johnson evidently was written to Mr. Lingeman.

Mr. Wooden: I offer the letter, four sheets, in evidence.

Mr. Leisure: Subject to our motion, we have no objection.

(COM. EX. 28-A to D inclusive was offered and received in evidence.)

Mr. Wooden: Reference is made in this exhibit to Mr. Johnson's letter of May 17, 1935. I should like to serve notice on counsel for the respondent Aetna Company to produce that letter if it is possible.

Mr. Leisure: That letter is written by Mr. Johnson to whom?

Mr. Wooden: To Mr. Lingeman.

By Mr. Wooden:

Q. I assume that is correct?

A. Yes.

Mr. Leisure: If such a letter is in existence, we will of course be very glad to produce it. What is the date of that letter now, Mr. Wooden?

Mr. Wooden: May 20, 1935.

By Mr. Wooden:

Q. Mr. Cree, reference is made in this letter under

648 point No. 1 to the sale by the Aetna Company of 1500 barrels of cement to the city of Grand Rapids.

A. Pardon me. Is that 1500 or 15,000?

Q. It reads 1500 in this photographic copy.

A. That was not much of an order then, was it?

Q. Do you think that is correct, or was it 15,000? Well, at any rate, will you describe the circumstances about the order that you refer to there?

A. I guess that was 1500. It was for one-tenth of the requirements.

Q. All right. Describe in your own words just what occurred in connection with that order that was taken by Aetna?

A. I am a little hazy on that thing. I think I remember we got an order over there.

Q. Why were you reporting to Mr. Lingeman about that case?

A. I cannot remember that incident. If I read that, I might refresh my memory, but I cannot remember that.

Q. Perhaps you can answer my last question; why were you reporting to Mr. Lingeman about that case?

A. Well, I am trying to figure out what criticism there was to our particular part of this business.

Q. Was there some criticism about your taking that order?

A. Evidently there was in Mr. Johnson's letter to Mr. Lingeman.

649 Q. Do you remember anything about the circumstances or the facts of your taking that order other than the exhibit itself mentions? If you don't remember it, we will pass it by.

A. Grand Rapids?

Q. Then it goes on to refer to a sale to the city of Kalamazoo. Do you remember anything about the Kalamazoo case?

A. I think that we—I know that we quoted on the Kalamazoo, and perhaps that was the objection in Grand Rapids. We gave those cities—that city or cities—I cannot remember the Grand Rapids incident, but I remember Kalamazoo. We quoted Kalamazoo on a yearly contract basis, the same as we did the city of Detroit, because it has always been our theory that we try not to discriminate especially in bidding like that, and if Detroit was entitled to a yearly delivery—

Q. (Interposing) What was the size of the Kalamazoo business?

A. Well, I think that was five or ten thousand barrels.

Q. Was that a different order from the one that is referred to here as 50,000?

A. That is the same order, but I do not think that it ran to 50,000, so that is probably the reason I mentioned 10,000.

Q. I noticed a statement here that you co-operated in this Kalamazoo deal to the extent of having the city
650 purchasing agent divide the order between Aetna, and Wolverine and Peninsula, and that those companies were very glad to get the business and did not raise the question of principle of a year's delivery period?

A. That is right.

Q. Do you mean by that statement in this memorandum that after you got the order for 50,000 barrels from Kalamazoo, you then shared that business with these other companies?

A. It really resulted in sharing that business, for this reason, if you would like me to explain that?

Q. All right.

A. I had several conversations with the purchasing agent of Kalamazoo. He had been called upon by the Cement Institute representative—
651 (The question and answer are read.)

Examiner Norwood: Go right on from there.

The Witness: And he was subjected to criticism because of the purchase of this cement on a yearly requirement basis. That was against my theory, because I thought if the city of Detroit was entitled to buy cement on a year's basis, why certainly the city of Kalamazoo should have that same privilege. On that theory I did not think about any quarterly requirements, so I did quote, but it so resulted that it became a kind of a mix-up proposition, and to save any future embarrassment or anything, I figured that I could get some business elsewhere that would not hurt the Aetna Company in saying, "If you want to change this and give some of these other fellows some business, all right, let it go, we don't care." So it resulted really in a division of that order down there, and the point was that these companies that did criticize us for taking this business on a year's basis—

653 Q. What was the Algoma quotation that you refer to under No. 3 of your letter to Mr. Lingeman, Exhibit 28?

A. That was a very little order. Our calculations were evidently wrong to the extent that we were just a little bit lower than the other bids to the government, and at that time we were under the code, and the Alpha Company, I think, made mention to the code authority that we had violated the code or something. It was purely an error in quoting, because at that time we had to quote under certain practices according to the code.

Q. Did you try to get out from under filling that order after quoting on it and the order was accepted?

A. That was a job over in Milwaukee, I think. Where is Algoma, near Milwaukee?

Q. I suppose it is in Michigan. I don't know. You have not answered my question.

The Witness: Read the question.

(The question is read.)

The Witness: I cannot recall on that.

By Mr. Wooden:

Q. Does the statement you made under point No. 3 654 refresh your recollection on it?

A. Yes, that is the order around Milwaukee or in that district, and I can remember that now. I believe that after we were cited in violation of the code, that we did take it up with the Milwaukee government office, and they insisted on our fulfillment, which we complied with.

Q. When you say you took it up, what do you mean? What did you do?

A. Well, we called them up when we heard about the thing. We called them up and they said they would insist upon that shipment, and so they got it.

Q. They said they would insist upon it. What did you say to them before they said they insisted on it, if you said anything?

A. Well, we were the only ones that were—

Q. (Interposting) You still are not answering my question. What did you say to them if you said anything before they said they would insist on your shipping?

A. Well, to recall now just what I said, I cannot.

Q. I don't expect you to quote it in exact words.

A. I no doubt said we were in violation of the code according to a complaint that had been made.

Q. Did you seek to get out of filling the order?

A. We took it up with the officer in Milwaukee and ex-

plained it to him, and he very quickly came back and
655 demanded fulfillment of the order, so the order was shipped.

Q. Did you seek to get out of filling the order?

Mr. Leisure: I think the question has been answered.

Mr. Wooden: Impliedly, but he has not answered it.

Examiner Norwood: Can't you answer that yes or no?

Mr. Wooden: I will grant it is implicit in everything he said.

The Witness: No doubt the call to this Milwaukee office was with the intention probably of eliminating ourselves from that particular contract because of this violation.

656 By Mr. Wooden:

Q. Mr. Cree, referring to Commission's Exhibit No. 28-A and your testimony this morning about dividing up that business that you obtained from the City of Kalamazoo with two of your competitors, I believe, did you ever do that before, that sort of thing before?

A. I can not remember, outside of that one case. In the City of Detroit, there were some bids there and the contract was divided in three ways.

Q. Divided by whom? Do you mean the city divided it?

A. By the city itself.

Q. I am speaking of a case where one company got the whole order and then divided it with its competitors. Was there any other case of that sort besides this one at Kalamazoo?

A. I can not recall of any.

Q. Did you ever make a division of that sort after this instance of the Kalamazoo order?

657 A. Not that I can recall.

Q. Did any other company at any time share with you, or your company, an order which it had obtained?

A. Not that I can recall.

Q. Do you know of any instances in which your company did not figure where other companies took orders and divided them after the order was given to a particular company?

Q. Now referring again to Commission's Exhibit 28-A, B, C and D under numbered paragraph 5 you make some reference to Charlevoi and then say that was a Government inquiry and the Government was quoted according to proper terms.

Mr. Leisure: Have you got a copy of that exhibit so that we can follow it?

Mr. Wooden: You can use this one. I can take the 658 original.

By Mr. Wooden:

Q. Will you state what that business or order related to, and what happened, and whether or not any complaint was made about your taking that order?

A. Well, there evidently was a complaint, but I can not figure it out. I see here that this was a Government order, an inquiry, and the Government was quoted by us according to proper terms.

Q. What did you mean by "proper terms"?

A. I no doubt referred to the conditions of sale at that time existing under the code, the Cement Institute.

Q. Did you have any reference to the price at which it was sold?

A. I do not think so. I can not really recall that incident: I remember that there was an order at Charlevoi, Michigan.

Q. You do not remember whether you meant by "proper terms" anything relating to price or not?

A. No.

Q. Now under Item No. 7 in that same exhibit you refer to the distribution of your cement in Cleveland?

A. Yes.

Q. If there was a complaint about your distribution in Cleveland what was it?

659 Mr. Leisure: Can not we find out where these complaints came from?

Mr. Wooden: I think we can.

Examiner Norwood: I think you will before he completes his examination, if there was one.

Mr. Wooden: The whole letter is an answer to the letter of the president raising these particular instances where, based on the witness' previous testimony, somebody was making a complaint. We do not know who. We hope to find out.

Mr. Leisure: I have not heard any testimony to that effect so far.

Mr. Wooden: I think the record will bear me out.

Examiner Norwood: Go ahead and answer the question.

A. Well, in answer to that, that is a little bit cloudy

too. I do not know. There evidently was a complaint as to our trucking of cement down there from our Cleveland warehouse.

By Mr. Wooden:

Q. You were trucking cement there, though, from your Cleveland warehouse?

A. Yes, but I do not know just what that particular complaint was without seeing the letter on it.

Q. You make the statement under No. 7 that your tonnage at Cleveland would be put through only by reli-
660 able dealers. Had you put it through some unreliable dealers?

A. No.

Q. What does that mean then?

A. That means that we would always continue to carry out the policy that we always observed, to have our cement go through dealers that were entitled to a good product and were equipped to serve the consumer in a proper way.

Q. Did that include the expectation that they would sell your cement at the regular price?

A. We never went into that detail.

Q. Did you have any complaints from competitors that some of your dealers were not selling their cement, or your cement, rather, at a regular price?

A. Yes.

Q. Did you have any such complaints from Cleveland?

A. I remember now that we did.

Q. Do you know who made the complaint?

A. If I remember correctly, there were two or three complaints from some of the other companies down there on some particular order, and I think the dealer's name was the Mayfield Supply Company.

Q. That was your dealer there?

A. That was our dealer.

Q. You spoke of two or three companies down there. To whom do you refer?

661 A. Well, the Medusa Company and the Standard Company, and—oh, I do not know, maybe somebody else, but there was a complaint down there, I recall that.

Q. How did it come to your attention?

A. Well, it came through that letter of Mr. Johnson's that I answered there.

Mr. Wooden: And which is not now available. We have asked for it to be produced.

By Mr. Wooden:

Q. Now reference is made in this Exhibit 28-C to the Soo Sand & Gravel Company, and some reference to their status as dealers. Will you describe the circumstances there, as to what was involved?

A. Well, that brings up a detail concerning a minor sale, if I remember correctly as I think I do, and the Soo Sand & Gravel Coompany were warehousing our cement and acting as distributors for us, selling our cement in turn to the other dealers in that particular community, and I think that refers to an inquiry from the Lighthouse Department of the United States Government, and it was in the nature of a—I think a small carload of cement, or cement to that amount, and the Soo Sand & Gravel Company got the inquiry and thought they were doing us a courtesy in getting it in, in having it in quickly, and they signed our name, I believe, and their name as agents, and we got the order. I believe there was criticism then
662 arising as to this dealer selling the United States Government. Such was not the case. He simply did us a courtesy and realized that this inquiry, of that particular small amount, could not get down to Detroit and back again with our signatures, so he signed, I believe, our name and then his name under, or maybe just his name.

Q. Do you know whether or not complaint was made about your part in that transaction?

A. I do know that there was a complaint.

Q. Do you know who made it?

A. I know that there was a complaint from the Petoskey Company.

Q. To whom?

A. That was to the Cement Institute, I think.

Q. Did you have any correspondence with the Cement Institute about the Soo Sand & Gravel matter?

A. I remember that there was correspondence.

663 The witness identified Com. Ex. 29 and Com. Ex. 30 as accurate copies of correspondence that he had with Mr. Reiter of the Cement Institute. He recognizes them as copies of correspondence that he had. "This" is in reference to the other job. The witness thinks "that" came after this first job mentioned.

665 By Mr. Leisure:

Q. Do you identify these as being letters written by you, Mr. Cree?

A. Well, I said I did, and that was the truth as I saw it. I do not think a second glance will change that.

Q. You wrote the originals of those letters?

A. Yes.

Q. Are you positive you wrote them?

A. I remember distinctly the job and it came after the first job that you mentioned there, regarding the little lighthouse job, the little job.

Q. You have read the letters now, as you sat there. Do you recall writing those letters?

A. Yes, I do.

Mr. Leisure: Subject to our motion, we have no objection.

666 By Mr. Leisure:

Q. This one (indicating) is to you. You remember receiving that letter, is that correct?

A. Yes.

Q. Did you receive that letter, the original?

A. I remember that.

Examiner Norwood: The papers identified by the witness are received as Commission's Exhibits 29 and 30 respectively.

(COM. EX. 29 and 30 were offered and received in evidence.)

667 Mr. Wooden: I still want to reserve the right to ask that certain documents be read into the record. I will try not to make the record burdensome in that respect. (Reading:)

"Aetna Portland Cement Company
Detroit, Mich.

July 31, 1935.

"Mr. Geo. H. Reiter,
Cement Institute,
Chicago.

"Dear George:

"I would very much appreciate it if you would have your office set us right on the prices in the Upper Peninsula. There appears to be considerable variance in numerous destinations and inasmuch as work is continually com-
668 ing up in that district, you realize the importance of having the proper information.

"I wish to describe to you a condition that existed at the Soo last week. The City asked for bids for their cement requirements. The price in the Soo was $2.18 in paper sax on cars and our price quoted was through one of our dealers who added 8 cents per barrel, thereby making a price of $2.26 per barrel delivered on the job, as the City called for delivery on the job. Two other dealers, I believe representing Huron and Petoskey, quoted $2.18 and $2.14 delivered on the job. This is a very embarrassing condition and does a grave injustice to your publication of the destination prices. I would appreciate your constructive advice as to what you think of a condition like this.

"With best regards, I remain,

"Yours truly,

"Harold S. Cree, Sales Mgr."

"The Cement Institute
Chicago

August 1, 1935

"Mr. Harold S. Cree, S. M.
Aetna Port. Cement Co.
Detroit, Mich.

"Dear Harold:

669 "This is in reply to your letter of July 31. We attach hereto copy of communication to the two companies mentioned in your letter regarding a recent biding at Sault Ste. Marie, Mich, which is self explanatory.

"Referring further to Mr. Nelson's letter of July 24 he has correctly given the prices now on file in this office for the destinations named. If these prices are incorrect may I suggest that you make a filing with this office for these destinations which will be distributed in our regular manner to all members doing business in that territory and which, based on our past experience, we expect will be met by all companies.

"Best personal regards.

"Yours very truly,

"Chm. Trade Practice Comm."

"GHR" are the initials, Chairman, Trade Practice Committee.

670 The witness identified Com. Ex. 31 as a letter he wrote to Mr. Oscar Rohwer, Assistant Salesmanager of Universal Atlas on June 28, 1935. That is his file copy of the letter he sent to Mr. Oscar Rohwer. It was evidently among the papers that were delivered to witness after his discharge.

Mr. Wooden: I offer it for the record, your Honor.

Mr. Leisure: Subject to our motion, your Honor, we have no objection.

(COM. EX. 31 was offered and received in evidence.)

By Mr. Wooden:

Q. In this letter to Mr. Rower dated June 28, 1935, you refer to a telephone conversation you had with him
671 the day before regarding the cement situation at Racine, Wisconsin. Will you state the substance of that conversation that you had with him over the telephone?

A. Well, I remember something about this thing without reading it. It was at the time that we first brought our first boatload of cement to Racine, Wisconsin, opening up a new warehouse there which I had picked out as a pretty good market inasmuch as Racine and Kenosha—and I had a pretty good friend with the Nash Motors, and that developed a nucleus of business to start with, and it was only about 25 miles, I believe, from Wisconsin, so I thought it was a nice district for us to locate, and we did not tell anybody about that arrival of the boat, and I thought it was rather peculiar that we were criticized that we did not announce the arrival of the boat. In the letter it dwells upon that fact, I believe.

Q. I was not asking your about the letter; I am asking you about the telephone conversation that you had that is referred to in the first paragraph of that letter?

A. Well, the telephone conversation was concerning what we were going to do with this boatload of cement that we had brought down there.

Q. Did he call you up or did you call him?

A. I think that he called—I am positive that he called me up. I had no reason to call him up.

672 Q. All right; go ahead and give us the substance of that telephone conversation?

A. Well, that letter refreshes it a little bit to my memory that he called up to find out what we were going to do in Racine, Wisconsin. They have a silo at Milwaukee,

and he was interested, and after I told him that it was another branch of our Wisconsin operations through the Limestone Products Company, as that letter states, he rather criticized us for not getting out an announcement, and I told him we did not worry about those things.

Q. I want to go back for a moment to Exhibit 28-C, your letter to Mr. Lingeman of May 20, 1935. I see a reference in there on page 3, which is Exhibit 28-C to detectives following operations of one of your distributors —Mr. Smith. What do you know about that?

A. Well, the substance of that is that Mr. Kerwin, a very fine fellow who runs the Green Bay warehouse for Mr. Smith, continually threw up to me that there were too many detectives from the—

Mr. Leisure: (Interposing.) Now, if your Honor please, here is some hearsay evidence that is being offered in the way of a conversation with this witness and someone who is not a defendant. It seems to me that we ought to have the privilege of having the government call the witness who talked to this witness and let
673 us cross-examine him as to these detectives that were following him. I object to this line of examination.

Mr. Wooden: We will get to that, but I nevertheless contend that this witness is entitled to state information that came to him in the ordinary course of business from one of his outlets or distributors, and on which information he had to predicate his business policy and action. If that be hearsay, it is that sort which in proceeding like this should not be excluded under well-recognized decisions of the courts as to the liberality with which rules of evidence should be applied in cases like this.

Mr. Leisure: Your Honor, I insist that it should be excluded for the reason that I have already pointed out. If any one had detectives following him, we should have the opportunity of cross-examining that person, not someone else who has been told about it by that person.

Mr. Wooden: If it were just anybody else, I would be inclined to agree with you.

Mr. Leisure: It is clearly hearsay evidence; it is incompetent, immaterial and irrelevant.

Examiner Norwood: Has he established any connection between this detective and any of these respondents?

674 Mr. Wooden: Not yet.

Examiner Norwood: Do you propose to do that?

Mr. Wooden: I will propose to do it, yes, sir.

Examiner Norwood: Objection overruled. Read the question and the answer, as far as it has gone.

(The record is read.)

The Witness: (Continuing.) From the competing companies around there, and he could not figure out why so much time and energy was spent in that kind of motion, which was a loss to constructive progress, as he saw it, or words to that effect.

Mr. Hal Smith: Does it appear as to which Mr. Smith was being followed?

The Witness: That is Mr. Edmond P. Smith, and he too is a very fine gentleman.

By Mr. Wooden:

Q. And was he your representative in selling cement in that territory?

A. Mr. Smith?

Q. Yes.

A. Yes.

Q. The Limestone Products Company was his company?

A. Was his company.

Q. And Mr. Kerwin was connected with that company, is that right?

675 A. At Green Bay, yes.

Mr. Wooden: I ask to have this statement marked Commission's Exhibit 32 for identification.

(The statement was marked "Commission's Exhibit 32 for identification.")

By Mr. Wooden:

Q. Showing you a paper marked Commission's Exhibit 32 for identification, will you state what it is?

A. Well, this is another page of criticism reflecting from our competitors.

Q. When I ask you to state what the paper is, I do not care to have you characterize the contents or anything of the sort, but be more specific. Was that paper prepared by you?

A. Yes, I remember that.

Q. Under what circumstances was it prepared?

A. Well, my reason for getting this thing out was to allow me to keep acclimated as to the current conditions in the immediate past so that if there had been any criti-

cism that would come, I would have a record of what had transpired.

Q. Was this paper also among the papers that were returned to you after you were discharged?

A. Evidently it was.

Mr. Wooden: I offer it for the record.

676 Mr. Leisure: May I ask just a question? Mr. Cree, what did you do with this memorandum after you prepared it? Did you just keep it with your files as a record?

The Witness: Well, now, I might have, or I might have sent it to Mr. Johnson, because Mr. Johnson did like to receive those things, in fact he complimented me in New York the last time I was there at the association meeting on that type of thing, and he wanted me to continue to make out memorandums as to the analysis that I would get of the cement competition, and so I continued to do that.

Mr. Leisure: And you considered it as a part of your duties to prepare this at the time you did it?

The Witness: Yes, I did.

Mr. Leisure: You were doing acts in the regular course of your employment?

The Witness: Yes, sir.

Mr. Leisure: Subject to our usual motion, your Honor, we have no objection.

(COM. EX. 32 was offered and received in evidence.)

By Mr. Wooden:

Q. There appears on this exhibit to have been some 677 pencil writing that has been erased or partially erased. Do you know anything about that, whose it was, or can you make out what it said?

A. No, I cannot make out that thing.

Q. All right. I notice in this exhibit you make reference to the Cleveland situation, a recent 11,000-barrel government job and refer to the Mayfield Supply Company as your dealer?

A. That is right.

Q. And you state, "To show how he stood on matters of this kind, the Mayfield refused to accept this tendered business at the market price."

A. That is right.

Q. Now, there is reference here to the Farm Bureau of Indiana, and you refer to Mr. Hughes of the Lehigh

and Mr. Pierson of the International who inquired about it. Did they inquire of you or your company as to what your position was with respect to sales to the Indiana Farm Bureau?

A. Yes, they did.

Q. This is nearly a year, isn't it, before that 1936 matter of the Farm Bureau sales came up?

A. I believe that is right.

Q. You say that "Mr. Hughes and Mr. Pierson will soon be informed as to our opinion in detail." Were they informed?

A. Not that I recollect, unless the continual ship-
678 ment of our cement down there was information that they might have derived.

Q. What was the Crown Point incident that you referred to and which you said you did not like?

A. It is possible that that was an incident concerning the Farm Bureau, too; one of their points, I believe, is Crown Point.

Q. Indiana?

A. I believe so. And I think we had an order from their dealer down there or distributor, or whatever you want to call him in that town, and then he lost the order. He lost it to the Universal Company. I think I am correct in that. And the incidents about that I cannot remember, but I could not have liked it very well as being just the right action.

Q. Did he lose it to another dealer? Did your dealer lose it to another dealer; is that the way it was?

A. I think so, yes.

Q. On a price basis?

A. That I cannot tell you.

The witness identified Com. Ex. 33 as a letter from
679 Mr. Franklin Johnson, dated October 10, 1935, to him. It is an original letter and bears Mr. Johnson's signature in Mr. Johnson's handwriting.

Mr. Wooden: I offer it for the record.

Mr. Leisure: Subject to our motion, we have no objection.

(COM. EX. 33 was offered and received in evidence.)

By Mr. Wooden:

Q. In this letter Mr. Johnson says: "In regard to that talk which we had with Mr. Gonkrite"—who is Mr. Gonkrite?

A. That is Mr. Conkrite.

Q. It says "Cronkrite" here. He says: "I want to follow out every line of good endeavor in the Upper 680 Peninsula." What did that mean to you?

A. Well, it meant that he was worried about our attitude in trucking cement from Mr. Smith's warehouse at Menominee to the points in upper Michigan.

Q. He refers to a talk that you and he had with Mr. Cronkrite. Do you remember that talk?

A. I do.

Q. What was it?

A. It was a talk concerning the operation of the Limestone Products Company.

Q. First let us find out who Mr. Cronkrite was?

A. Mr. Cronkrite was in the sales department of the Universal Portland Cement Company.

Q. Where?

A. At Chicago.

Q. Well, you had not finished with your description of the talk that you and Mr. Johnson and Mr. Conkrite had?

A. The talk was on the subject of the Limestone Products Company in dwelling on the trucking of cement, especially in the Upper Peninsula, where we had been trucking on a similar basis as we had been in Wisconsin, where we thought, in fact I thought it was a proper thing. The trucking was enjoyed in the Peninsula, and I thought the fellows in the Upper Peninsula ought to have it too.

Q. Can you tell us what you said in substance to 681 Mr. Conkrite and what he said in substance to you?

A. Well, I cannot remember the actual conversation, the details, only that he was pressing to have us control our trucking in the Upper Peninsula and have us be sure that our distributors, Mr. Smith, kept up 100 percent to the trucking regulations as to the delivery of cement and the amount on each load, and so forth.

Q. What do you mean by the trucking regulations?

A. Well, there was a prevalent trucking plan in Wisconsin, then.

Q. What was it?

A. Well, it was a plan that described the minimum amount of cement on a truck as of 60 barrels of cement, and it described also the method of delivery as to the cement not being taken to the job but to the dealer's warehouse.

Q. And in that last respect, that ran counter to your method or plan?

A. In the Upper Peninsula, yes.

Q. Mr. Johnson goes on to say that he "Wants to have the same splendid reputation that we enjoy in the lower part of Michigan as far as our playing ball 100 percent on the square. What is necessary to do, I know you will get right out at it with Oscar"—is that Mr. Lingeman?

A. Yes, it is.

Q. (Continuing) "—and straighten out the whole
682 situation." Did you and Mr. Lingeman get right at it in an effort to straighten out the whole situation?

A. Well, I don't think I showed any particular speed in getting at the thing, but some time after, there came the development of those trucking meetings that I believe you have spoken about.

Mr. Wooden: I ask to have this paper marked Commission's Exhibit 34 for identification.

(The paper was marked "Commission's Exhibit No. 34 for identification.")

683 Mr. Wooden: May I interpolate here to inquire whether Mr. F. R. Johnson is in the room?

Examiner Norwood: Off the record?

Mr. Wooden: No, I would like to have it on the record.

Examiner Norwood: All right.

Mr. Wooden: I might say that Mr. Johnson has been subpoenaed to appear here at 2 o'clock this afternoon, and if he is not here we, of course, will have to postpone using him until we can get him.

The witness identified Com. Ex. 34 as a memorandum sent to him by Mr. Johnson regarding the distribution policy of Aetna cement. He was informed by Mr. Johnson and Mr. Conkrite that the memorandum was the result of a meeting that Mr. Johnson had with Mr. Conkrite of the Universal Company and Mr. Johns of
684 Medusa. The handwriting in ink on the bottom of the memorandum is that of the witness. The few words interlined in pencil were placed on the paper by the witness at the time he received the paper. The memorandum came to him in the ordinary course of business as sales-manager of Aetna.

Voir Dire Examination by Mr. Leisure.

The witness said he did not know who wrote the memorandum, but that it came from Mr. Johnson at the time of his meeting with Mr. Conkrite and Mr. Johns of Medusa.

Mr. Leisure: Well, I object to the memorandum, if Your Honor please, if the witness does not know who wrote it.

By Mr. Wooden:

Q. Did you understand, in the course of the circumstances at the time, that it was Mr. Johnson's memorandum?

685 A. Oh, certainly.

Mr. Wooden: I think the contents also will indicate that, if I am not mistaken. I renew the offer.

Examiner Norwood: Are there any further objections? You have offered it, have you?

Mr. Wooden: Yes.

Examiner Norwood: Are there any further objections?

Mr. Leisure: My objection is, Your Honor, that the memorandum is incompetent, irrelevant and immaterial, no proper basis being laid for its offer in evidence.

By Examiner Norwood:

Q. For what purpose did Mr. Johnson give you that memorandum?

A. Well, for the purpose of having us adhere to the outline of that particular memorandum.

Q. He gave you that as something having his approval?

A. Yes.

Mr. Leisure: Mr. Johnson was in Boston, Your Honor. I did not understand the witness to say that Mr. Johnson gave it to him.

Mr. Wooden: No, he said it was sent to him, I believe.

The Witness: Did I say he gave it to me? I meant 686 he did send it to me. I was not there at that time.

Mr. Wooden: The Examiner used the word "gave".

(COM. EX. No. 34 was offered and received in evidence.)

Mr. Wooden: Memorandum dated October 25, 1935.

"At a meeting today it was considered to be to the best interests of all parties concerned that the Aetna Portland Cement Co. should discontinue distributors. They would

continue their practice now—as they will in the future—of shipping their cement by boat to their various destinations, putting that cement in warehouses, but they should sell that cement by their own selling force, and the bills for that cement should be made from the head office at Detroit. That is to embrace all wholesale points now, and distributors should be eliminated, meaning that in the future no distributors should be appointed without that permission of the President.

"The question of Mr. Smith and the Limestone
687 Products Company is one that must be worked out, along on this basis. If Mr. Smith can work in accordance with our instructions, and the billing and selling be done by the Aetna Company, that is a point which the others don't like, but we must consider it; and if he cannot work in that line, then we shall have to do without him.

"In shipping cement into the upper Peninsula, it should go in carload lots, and no truck deliveries be made.

"All of this seems to be a step necessary for better harmony and better understanding, and we hope for general better satisfaction."

Now I notice on the bottom some writing which you said is in your handwriting, "Meeting in Boston," and what are the other words?

The Witness: Meeting in Boston, Johnson, Conkrite."

By Mr. Wooden:

Q. Were you at the Boston meeting?

A. No, I was not.

Q. What is the basis of your handwriting on there, that the meeting was in Boston and that Mr. Conkrite was there?

A. Well, I later heard from Conkrite on it and I know about it that way.

Mr. Smith: Your Honor, may we ask to have that
688 photostated? There are on it some notations which have been called to the witness' attention which have not been read into the record. We would like also to have the exhibit photostated so it is in there in its entirety.

Mr. Wooden: I passed one photostat out, which you may have, under the arrangement I made with Mr. Leisure.

Mr. Smith: This is an exhibit, is it?

Mr. Wooden: Yes.

Mr. Smith: It is a part of the record.

Mr. Wooden: Yes.

Mr. Leisure: Now may I just ask a question about this writing?

Mr. Wooden: Yes.

By Mr. Leisure:

Q. When did you write that on there, Mr. Cree, about the meeting?

A. I no doubt wrote this on here on receipt of the thing, to get it off my mind.

Q. How did you know, when you received it, that Mr. Conkrite was there?

A. How did I know that Mr. Conkrite was there?

Q. Yes.

A. Well, from information that I had gotten. I do not know whether that came from Mr. Johnson, I presume
689 it did at that time, but I also heard from Mr. Conkrite to that effect.

Q. But you say you wrote that on it as you got it?

A. Shortly after I received this I wrote it on there. It might have been the same day.

Q. Then you want to change your testimony, you did not write it on there just when you got it?

Mr. Wooden: He has not said that exactly.

A. When I received this particular memorandum, to analyze it, at that particular time I no doubt put these little hen scratch marks on there. Now I can not remember whether there was an advance telephone as to this thing coming or not, I do not know, but I do know that I put that on there about that time.

By Mr. Wooden:

Q. Did you say you asked Mr. Conkrite about the Boston meeting?

A. I did.

Q. Afterwards?

A. After the meeting?

Q. After the meeting.

A. I did not know that the meeting was even going to take place, and this is a very important document as to the welfare of the company that I was trying to represent.

Q. How long after the meeting was it before Mr. Conkrite told you about it?

690 A. Why, shortly after that, a few days later, I believe.

Q. Under what circumstances did he tell you about it?

A. Why, he called me up.

Q. From where?

A. I think it was Chicago.

The witness identified Com. Ex. 35-A to C as a memorandum of a telephone conversation that he had with Mr. Conkrite. Miss Lucille Fowley, employed in his office, made a record of the telephone conversation.

Q. How did you arrange for her to make the record of that telephone conversation?

A. Well, as I recall,—I was not in the habit of having anybody listen on the telephone, or anything like that, but this was very imporfant and things were coming as to
691 these little petty details, but as to big details if they were not checked and properly analyzed—I was hoping to work out the situation someway satisfactory to the best interests of the company. I wanted to get a proper record of it, so I did ask Miss Fowley to get on there and listen so I would have a record of that, that I really knew nothing about.

Q. I did not ask you why. Most of your answer was devoted to answering the question why. I asked you how you arranged it and I believe you did touch on it before you got through, just at the last part of your answer.

A. You mean how I arranged it?

Q. Yes, how did you go about arranging it, how did you go about arranging for Miss Fowley to make a record of this conversation?

A. Well, I asked her to get on the telephone.

Q. An extension?

A. Extension. She is a stenographer. She took what she could down there.

Q. Both sides of the conversation, yours and his?

A. Yes, I remember that.

Mr. Wooden: I offer the document for the record. Let me first, however, ask whose writing that is across the top in ink?

The Witness: That is my writing.

By Mr. Wooden:

692 Q. When was it placed on there?

A. No doubt at the time I received this copy from Miss Fowley.

Q. Was that among the papers that were delivered to you after your discharge?

A. It was; I imagine it was.

693 (COM. EX. 35-A, 35-B and 35-C was offered and received as evidence.)

694 Q. Mr. Rooney, may I ask, Mr. Cree, is who?

A. Salesmanager of the Huron Cement Company.

(Mr. Wooden continued reading "Commission's Exhibits 35-A, 35-B and 35-C.")

By Mr. Wooden:

Q. I will stop there long enough to ask you, Mr. Cree. The memorandum referred to is Commission's Exhibit 34?

A. That is the one, yes.

(Mr. Wooden concluded reading "Commission's Exhibits 35-A, 35-B and 35-C.")

Mr. Wooden: Then there is a pencil notation on the bottom of the last sheet that has been erased. Do you know whose it was? Can you read what was said? Do you know who erased it?

The Witness: No, I can not distinguish that at all.

Mr. Wooden: I ask to have this marked Commission's Exhibit 36.

695 (The document referred to was marked for identification "Commission's Exhibit No. 36.")

By Mr. Wooden:

Q. I am now showing you a paper marked Commission's Exhibit 36 for identification. Can you state what it is?

Mr. Herschberger: May I interrupt? Was that memorandum which you read dated?

Mr. Wooden: No, it was not.

Mr. Herschberger: Does it indicate the date of the telephone conversation?

Mr. Wooden: He fixed the date as a few days after the date of the memorandum on October 25, but this memo is not dated, that is, I mean the telephone memo.

Mr. Zimmerman: Did you ask the witness if he erased that?

Examiner Norwood: You may ask him.

Mr. Wooden: I gave him a double-barreled question. I will go back to it.

Examiner Norwood: Can not you tell what that is?
The Witness: Yes, sir.

By Mr. Wooden:

Q. Can you yet say what that paper is?
A. This is a memorandum.
Q. It is in longhand. Do you know whose writing it is?
696 A. It is my writing evidently and refers to that conversation.
Mr. Leisure: Is it dated? Can we fix the date?
Mr. Wooden: No, the paper is not dated. It is addressed to John.

By Mr. Wooden:

Q. Do you know who that is?
A. I do not know who that is. I am trying to figure it out.
Q. But it is your writing and you prepared it, I assume?
A. Yes.
697 Q. Can you state when you prepared it and under what circumstances?
698 A. Well, it was just the preparation of my thought in the matter, I imagine, and I no doubt threw it on my desk and left it there. It is not completed.
Q. Who is John?
A. I don't know. I am trying to figure out.
Q. Why would you be talking about this matter to a man that you address as "John" and then not know who John is. Did you ever call Mr. Lingeman, John? His middle initial is J. I don't know whether it stands for John.
A. No.
Q. Is it the Medusa man? Is his name John or Johns?
A. Johns, I believe; it J. B. Johns. I was just trying to figure this out. The thing is not complete here. It is a memorandum. I may have started to put "Johnson" down there, or something. It was rather nervously written here anyway.
699 Q. Did you make this memorandum at the time or approximately at the time of the telephone conversation?
A. I presume I did. That is when I would do it.

700 Q. Have you already stated why you made the memorandum at the time? If not, state it?

A. What memorandum?

Q. Why you made this memorandum?

Mr. Leisure: If he knows.

The Witness: Well, let me see it again.

Mr. Wooden: (Handing paper to witness.) If he cannot tell, why, no one else can.

The Witness: Well, this also deals with the—

By Mr. Wooden:

Q. (Interposing.) Don't forget my question, which is why did you write that?

A. Well, I wrote that to have as a matter of record for myself, as I did a lot of things.

702 (COM. EX. 36 was offered and received in evidence.)

The witness identified Com. Ex. 37-A, B and C as a memorandum dated October 28, 1935 written by him to Mr. Lingeman evidently to be sent on to Mr. Johnson.

703 That memorandum prepared by witness in the course of his duties as sales manager of Aetna related to the subject matter of the memorandum of the meeting in Boston.

704 Washington, D. C.,
Friday, December 10, 1937.

705 *Direct Examination by Mr. Wooden (Continued).*

Q. Mr. Cree, referring to Commission's Exhibits 37-A, B and C for identification, I am not quite clear whether you identified that paper last night or not.

A. Well, I wrote that as a memorandum to Mr. Johnson through Mr. Lingeman.

Q. And was the original transmitted to Mr. Lingeman?

A. Yes.

Q. Do you know whether it ever reached Mr. Johnson?

A. Yes.

Q. How do you know?

A. He showed it to me at the meeting in Chicago.

Mr. Wooden: All right. I offer this exhibit for the record.

Mr. Leisure: Subject to our motion, we have no objection, Your Honor.

(COM. EX. 37-A, 37-B AND 37-C was offered and
706 received in evidence.)
707 Q. Now you refer in this Exhibit 37-A to the adoption of the Wisconsin plan of trucking for the upper peninsula and then state that that plan eliminates over 90 per cent of the trucking in the upper peninsula, and refer there to the dealer trade being a very small part, and your conclusion was it was practically the same as eliminating trucking in its entirety, is that right?

A. Yes.

Q. Some reference is made here to a visit of a Mr. Craig. Who was Mr. Craig?

A. Mr. Craig was associated with the Universal Atlas Company.

Q. Did he pay you a visit about that time?

A. Evidently he did.

Q. What did he do?

A. I can not recall the nature of his visit.

Q. Referring to the last sentence in the first paragraph of Exhibit 37-A, if that refreshes your recollection just state what he did.

Mr. Leisure: It is Exhibit 37 he is talking about, is it not, that he is reading?

Mr. Wobden: Yes, 37-A.

By Mr. Wooden:

Q. Did you see the last sentence of the first para-
708 graph to which I directed your attention?

A. The difference in the trucking play in Wisconsin, that was the nature of it.

Q. The nature of Mr. Craig's visit?

A. Yes. It seems we filed a plan in Wisconsin with the Cement Institute and later filed the—

Mr. Leisure (interrupting): If the Court please, I want to get all of this witness' recollection, but if he is merely guessing I do not want that on the record. If he knows what was done and participated in the event we want it, but I would rather he would not give anything that he did not participate in personally.

Mr. Wooden: I would rather have that same thing.

By Mr. Wooden:

Q. Did you participate, Mr. Cree, in the filing of your trucking plan with the Cement Institute?

A. I did.

Q. Did you do the filing yourself?

Mr. Leisure: May we have the date, please?

Mr. Wooden: It is approximately fixed here by this document, I should say.

A. That would be a record with the Cement Institute.

By Mr. Wooden:

Q. Yes, but you personally filed the plan?

Mr. Leisure: Can not we get when this was done,
709 Your Honor?

Examiner Norwood: Well, we can eventually. He is trying to get the information now.

Mr. Wooden: There was a subsequent filing.

Mr. Leisure: We may not get it later, Your Honor. That is the point of my objection. The date is important.

By Mr. Wooden:

Q. Well, you say further in Exhibit 37-A, Mr. Cree, that "The Cement Institute, on receipt of our new filing for the Upper Peninsula, expressed their appreciation of the constructive step, and the statement was made by them that they knew everyone would immediately follow suit." Who, on behalf of the Cement Institute, expressed that appreciation that you state there?

A. George Reiter.

Q. In what form did he express it, in writing or how?

A. No, by telephone, when we filed that—

Mr. Leisure: Can not we get the dates so I will know what he is talking about?

Examiner Norwood: Yes. What time was this?

The Witness: Well, the exact date I do not know. It would be a date that would harmonize with those dates expressed in those memorandums there. It is a record with the Cement Institute.

710 Mr. Wooden: That will come out later.

Mr. Leisure: That is satisfactory.

Mr. Wooden: I think I can fix the exact date a little later.

By Mr. Wooden:

Q. Now you say Mr. Reiter telephoned to you.

A. I talked to him over the telephone. Whether he telephoned me or I talked to him, called him, I do not know, I can not remember.

Q. Did he make the statement that they knew everyone would immediately follow suit?

A. He made the statement, I believe, to the extent that he thought sure—

712 A. That he thought they surely would follow.

By Mr. Wooden:

Q. You go on to say that "Our competitors do not care to have us in that district," the Upper Peninsula, I infer, "under any consideration or condition, and, of course, it does hurt them to realize that they can not point their finger at us to the extent of a cut price." Had any charges been made that you had cut the price up there?

713 Q. There is a question pending. Will you answer it, Mr. Witness?

A. I can not remember any definite criticism. No doubt there was general criticism.

Mr. Leisure: I object to that. If he can not remember any definite criticism, that answers it.

Examiner Norwood: That answers his question as to whether there was criticism. He has a perfect right to answer if there was any criticism. He can answer that yes or no, and then the question as to whether that criticism should be given into the evidence is another question.

By Mr. Wooden:

Q. You say on Exhibit 37-B, "As far as our other warehouses are concerned our same policy of maintaining the proper destination price under proper terms and conditions of sale was observed." Then you refer to the Detroit meeting, being accused of irregularities at Port Huron. What were those alleged irregularities at Port Huron?

A. Well, we had a warehouse at Port Huron distributing our cement from that warehouse and we sold quite a bit of cement around, and we were rather—I don't know—there was not any criticism that they could offer as proof of anything that would be detrimental to their fair in-

714 terest, because they did not exist, but they criticized in a general way to our operation, the potential possibilities of the thing.

Q. And reference is here made to a case brought by the Peerless.

Q. Do you remember that? Do you remember what the Peerless accusation was?

A. The Peerless Company—

Mr. Leisure: That can be answered yes or no, Your Honor.

Mr. Wooden: Yes, answer yes or no.

Examiner Norwood: Answer yes or no.

A. What the—

715 By Mr. Wooden:

Q. No, just answer the question yes or no and then if it calls for further development I will seek to do that.

A. Yes, I remember that.

Q. All right. What was the accusation made by Peerless?

Mr. Leisure: Now I object to the question unless the counsel designates in his question whether or not the criticism or accusation came from any of the respondents, so that the question would be material and relevant and competent in this case.

Mr. Wooden: Peerless is a respondent, I believe.

Examiner Norwood: One of the respondents.

Mr. Leisure: I am talking about the accusation, not the Peerless.

Examiner Norwood: Objection overruled.

A. Well, the Peerless had a cement plant up there and that thing was practically dismantled, then I started a warehouse up there through their leading—who had been their leading customer, but he had been my friend before they ever knew him, but when the Peerless plant started there, why, I dropped selling him; but when they stopped making cement at Port Huron, why, through this warehouse I sold this leading customer in Port Huron and got most of the tonnage up there.

By Mr. Wooden:

Q. Who was that leading customer?

716 A. A man named Foster.

Q. A dealer?

A. He was our warehouse operator and also a dealer.

Q. You go on to say in Exhibit 37-B, "Perhaps we can arrive at a zoning system that would be a satisfactory compromise." Did you ever arrive at that sort of a compromise?

A. A zoning system on what? Trucking that refers to?

Q. We are talking about the Wisconsin plan, yes.

A. No, that was never arrived at.

Q. Then you say, "This memo would suggest that we do everything that our competitors say that we should do which we know is to their benefit rather than to ours, and it makes us realize that they and not ourselves are running our business, so naturally to put over their demands they would hold out an increased price of cement." Was any suggestion or offer made by any of your competitors of holding out an increased price of cement?

A. I can not recall.

Mr. Leisure: I ask that that be answered yes or no, your honor.

Examiner Norwood: What was your answer?

A. I can not recall any.

By Mr. Wooden:

Q. You go on to say, "That is becoming smart business. We feel we are not big enough to disturb conditions
717 to the extent that we are going to be instrumental to have companies like the U. S. Steel Corporation or the Huron Company to raise or lower their prices. We believe that this price condition will be done just when they want it to be done and not before." Did you recognize those concerns as price leaders in any sense?

A. I did.

HAROLD S. CREE, called as a witness on behalf of the Commission, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

718 The witness identified Com. Ex. 38 as a memorandum prepared by him addressed to Mr. Lingeman concerning those events.

Mr. Wooden: I offer it for the record.

Mr. Leisure: Subject to our usual motion, your Honor, we have no objection.

(COM. EX. 38 was offered and received in evidence.)

By Mr. Wooden:

Q. In this Exhibit 38, Mr. Cree, you refer to Mr. Johns' visit the day before. Is that Mr. Johns of the Medusa Company?

A. It evidently is.

Q. You stated in your memorandum to Mr. Lingeman: "It must be remembered that he said he would endeavor to eliminate the future selling of Petoskey cement at cut prices in order that Mr. John Galster would be able to sell the bonds on that respective job." Can you add anything to the details of that matter?

A. No definite detail on that. There must have been some remark along those lines, but I cannot recall any-
719 thing definite on it.

Q. You go on to say: "Any stories to the contrary of our getting the proper destination price which is the main thing, are not true and it is indeed very embarrassing to continue to say 'it is not so' to these unfriendly, untrue statements coming from our competitors." Have you given all that you can as to the identity of the parties who made any such accusation?

A. I think I previously mentioned those things, have I not?

Q. In the last paragraph of this Exhibit 38, you state: "Mr. Rohwer at Chicago, made the remark when he was in a very nervous state, that he did not care to talk with Mr. Smith, that he was afraid he would become indicted." Do you recollect Mr. Rohwer making that remark?

721 A. Well, the occasion was at the Union League Club in the presence of Mr. Lingeman, and when we got back he wanted me always to make up different memorandums and he would give me different data, and I would incorporate them in those things as a record for Mr. Johnson, and Mr. Lingeman was there with Mr. Rohwer and Mr. Smith and Mr. Conkrite.

Q. Now, you have named the place and the circumstances and the parties present. Can you say when?

A. I don't remember the date. It might suggest it there.

Q. (Handing paper to witness) Obviously some time prior to the date of your record. Fix it as nearly as you can.

A. Well, of course, it was some time previous to October 30, 1935.

Q. Can you do any better in fixing the exact date?

A. Well, the date would be around the publication of that trucking plan, I imagine, which could be arrived at by ascertaining that information from the Institute.

Q. Now, showing you Commission's Exhibit 39 for identification, will you state what it is?

A. This is a copy of a notification to George Reiter of the Cement Institute.

722 Q. Whose notification?

A. The Aetna Company's notification as to the change in their policy of trucking cement in the Upper Peninsula of Michigan.

Mr. Wooden: I offer it for the record.

Mr. Leisure: May I ask the witness a question on the exhibit, your Honor?

Examiner Norwood: Certainly.

Mr. Leisure: Mr. Cree, this comes from your office files?

The Witness: I think it must.

Mr. Leisure: Do you know that it was written on or about that time?

The Witness: I do.

Mr. Leisure: Who wrote it, do you know? Who in your organization, if any one, wrote it?

The Witness: Well, the stenographer would write it.

Mr. Leisure: And would you dictate it or some of your associates?

The Witness: Yes.

Mr. Leisure: Did you see it before it was sent out?

The Witness: Oh, yes.

Mr. Leisure: I mean when you read it now, does
723 it refresh your recollection as being a document that you saw at the time it was prepared?

The Witness: Oh, yes; yes.

Mr. Leisure: Subject to our motion, we have no objection.

(COM. EX. 39 was offered and received in evidence.)

724 The witness identified Com. Ex. 40 as a telegram from Mr. Johnson to Mr. Lingeman referring to a telephone conversation.

Mr. Wooden: I offer that for the record.

Mr. Leisure: Subject to our motion, we have no objection.

(COM. EX. 40 was offered and received in evidence.)

The witness identified Com. Ex. 41 A and B as "(indicating)" a wire from Mr. Johnson to Mr. Lingeman, and "(indicating)" a letter from Mr. Johnson to Lingeman bearing Mr. Johnson's signature in his handwriting.

Mr. Wooden: I offer those papers for the record, your Honor.

Mr. Leisure: May I ask a question there?

725 Examiner Norwood: Yes.

Mr. Leisure: I notice, Mr. Cree, that those are addressed to Mr. Lingeman. Were those among the papers that were turned over to you as you have already described? Is that where these exhibits came from?

The Witness: Evidently so.

Mr. Leisure: These were the ones that were brought up to your house?

The Witness: Yes. You see, all of that stuff was turned over to me for my analysis. I think the wire speaks about that, too.

(COM. EX. 41-A and B were offered and received in evidence.)

The witness identified Com. Ex. 42 A, B and C as a copy of some memorandum given to him by Mr. Lingeman on which the witness made little notations. He made these little notations when the memorandum was received.

726 No doubt he made them on November 21, 1925 if he was in the office on that day. He believes it was rather important; Com. Ex. 42 D to S as copies of the results of biddings at the invitation of the State Procurement Office at Lansing. He believes that they are prior to November 21, 1935, if these things are in chronological order.

727 Com. Ex. 42 A to C has reference to the papers that are marked Com. Ex. 42 D to S. This deals with that particular thing which was attached to it. The purpose at the time in making pencil notations on that memorandum of November 21st was to analyze these things, "and I had to get these darned memorandums that you have been showing here, up." The witness could not say whether or not he later prepared a memorandum of his own comments on this memorandum of November 21st. "There is so much of that stuff." The witness received these papers from Mr. Lingeman and he knew that because it came in the regular way from Mr. Johnson to Mr. Lingeman

728 and to him. The witness said that the papers referred to in Com. Ex. 41 A and Com. Ex. 41 B are the ones that he looked at marked 42 A to S.

Mr. Wooden: I offer Exhibit 42-A to S for identification for the record.

Mr. Clark: I wish to make an inquiry for the purpose

of clarifying the record and see whether or not my understanding is correct.

Examiner Norwood: Yes.

Mr. Clark: I understand that these matters are being admitted now subject to a reserved motion to strike to be made upon such grounds as may then be urged, with the same force and effect as if objection were made in the first instance. Is my understanding correct?

Examiner Norwood: My idea was to strike parts of them—

Mr. Clark: (Interposing) And that reserved right inures to the benefit of each of the respondents separately, is that correct?

Mr. Wooden: I so understand.

Examiner Norwood: That is agreed.

(COM. EX. 42-A to S inclusive was offered and received in evidence.)

729 Mr. Wooden: Your Honor, here is one of the cases where I wish to read into the record the three pages that comprise Commission's Exhibit 42-A to C inclusive.

"On November 18, 1935, a new base price of $1.50 was established by the Huron Company at Muskegon, Michigan. This lowered the former prevailing price in the Grand Rapids, Muskegon and contingent market up to 20¢ per barrel. I felt sure you would be interested in the reasons for this change and accordingly have visited Detroit, and am prepared to advise you the particulars as follows:

"For fundamental reasons, it has long been contrary to the general practice of the industry to bid mill prices. Notwithstanding, the Procurement Officer of the Michigan State W. P. A. office has recently requested bids which alternately asked for price at point of origin, namely a mill price. The Companies as a whole have refrained from permitting their representative dealers to bid on any such basis, as any such procedure, together with land grant rates available to the United States Government, would immediately and positively destroy the industry's pricing method.

"In this connection a recognized and widely understood procedure of bidding, to make land grant rates
730 effective on direct purchases by the United States Government, has for some time been in vogue and used so extensively that those at all familiar with ac-

cepted industry practice could hardly plead ignorance of it.

"W. P. A. purchases are not made direct from the manufacturers but rather through the dealers, and accordingly this procedure eliminates the possible use of the land grant rates; likewise, it has long been recognized as an essential practice to sell the dealer only in the territory he regularly and logically serves. The chaotic results of any other form of dealer distribution would obviously be apparent to all.

"In spite of this established industry practice, I enclose tabulations of recent bids received by the State W. P. A. Procurement Office which, together with footnotes, show glaring examples of accepted practice violations on the part of dealers bidding on Aetna cement.

"Please take a map of Michigan and note the relative locations of Royal Oak, Greenville, Belding, Grand Rapids, Marshall and Rockford. The McCall Lumber Company are Aetna dealers at Royal Oak, Michigan. The
Standard Building Supply Company are Grand
731 Rapids dealers handling Aetna Cement. The 'point of origin,' or mill price, made by the Standard Building Supply Company on November 14, 1935, when used in connection with a Government land grant rate effective from Bay City to Grand Rapids, constitutes a cut of 12¢ a barrel of the then current Grand Rapids price. Likewise, the bid made on November 18, 1935, by the McCall Lumber Company of Royal Oak, for delivery at Marshall, Michigan, when used in connection with land grant rate, reduces the Marshall price 5.6¢ per barrel.

"Please note further that the Royal Oak Aetna dealer has bid for delivery at Lincoln Park, Detroit, Belding, Greenville, Highland Park, Grand Ledge, Battle Creek, Grand Rapids and Mt. Clemens. Also that the Grand Rapids Aetna dealer has bid at Rockford and Wayland.

"When a dealer thus bids and makes delivery outside his logical territory, the industry can accept his action only as representing a distributorship. This practice on the part of Aetna dealers is now encouraging other dealers to attempt such procedure, even without any authority from the Companies from whom they regularly purchase.

"With all other Companies definitely opposed to the
'point of origin' or mill price selling, and like-
732 wise opposed to permitting a dealer to sell and distribute promiscuously outside his regular territory,

the reductions in price thus made by the Aetna Company could not logically be met except by the lowering and establishment of a new current destination price at markets affected.

"The entire industry in Michigan and contingent territory, for these bad practices do not long recognize State boundary lines, is much concerned over these acts on the part of the Aetna Company and their dealers. We already have the results of what one Company has elected to do to remain competitive, and I can only leave to your conjecture what the further effects of a continuation of such practice on the part of the Aetna Company may produce."

The memorandum is not signed, it is not addressed to any individual or company.

735 Q. Mr. Cree, this Exhibit 42-A to C starts off by describing the establishment of a new base price of $1.50 by the Huron Company at Muskegon, Michigan, on November 18. Did you do business in that Muskegon territory, or at Muskegon?

A. We did.

Q. In what way? What was the method you carried on business there?

A. You mean the entire period of years?

736 Q. No, at this time in November, 1935.

A. At that particular time?

Q. Yes.

A. Well, our distribution of cement was mainly from our Grand Haven warehouse. It had to be brought down by boat and then retrucked to the district around there, which takes in Muskegon and Grand Rapids.

Q. Did the Huron Company have a mill at Muskegon?

A. Did they?

Q. Yes.

A. At that time they had one of their bulk boats tied up to the dock, carrying bulk cement.

Q. Is that your way of answering my question as to whether they had a mill there?

A. A mill for manufacturing cement?

Q. Yes.

A. No.

Q. Did they ever have one there?

A. No.

Q. Did they have a silo there?

A. Well, they had,—I saw it once,—they had what

you might term a portable bulk container. I do not know whether you would term that a silo or not. I usually think of a silo as a larger affair. I think this carried about 250 to 300 barrels of cement which they take from the boat.

737 Q. Had Muskegon ever been a basing point before that, to your knowledge?

A. Not to my knowledge.

Q. In the Grand Haven and Muskegon territory what basing point ordinarily governed?

A. I believe that would fluctuate, in looking over the past history, but I think the prevalent base would be the Buffington base.

Q. At the Universal plant there?

A. Yes.

Q. Who were the principal concerns doing business in the Muskegon and Grand Haven territory?

A. Well, of course I must first mention the Aetna Company at Grand Haven, and then the Huron Company at Muskegon, and Universal were bringing in small quantities of cement by boat to Muskegon, and the Medusa Company came in that same district by a smaller boat at the port of Holland, Michigan.

Mr. Wooden: I ask to have these marked Commission's Exhibits 43-A, 43-B, 43-C and 43-D.

(Te documents referred to were thereupon marked for identification "Commission's Exhibits 43-A, 43-B, 43-C and 43-D.")

By Mr. Wooden:

Q. Mr. Cree, do I understand that all this pencil writing on Exhibits 42-A, 42-B and 42-C is yours?

738 A. I will have to take a look at that. I think I can definitely recognize that as mine.

Q. What was your purpose at the time in putting the pencil notations on these papers?

A. To better enable me to, perhaps, write a memorandum of the thing.

Q. Directing your attention to the last paragraph upon Exhibit 42-C, the typewritten text of the last sentence reads, "We already have the results of what one company has elected to do to remain competitive." What did you write at that time in your pencil writing applicable to that statement?

A. Well, it spells "combined".

Q. You mean in your mind you substituted the words "remain combined" for "remain competitive"?

A. I evidently did.

Mr. Zimmerman: I could not understand. Remain what?

Mr. Wooden: "Remain combined" instead of "remain competitive".

Mr. Zimmerman: One company to remain combined?

Mr. Wooden: Well, it states, "We already have the results of what one company has elected to do to remain competitive."

Mr. Zimmerman: Yes.

Mr. Wooden: That is what the witness put on at
739 the time.

Mr. Zimmerman: Like what he wrote at the top.

Mr. Wooden: Yes.

Mr. Zimmerman: That is silly.

Mr. Wooden: That is on another point.

740 The witness identified Com. Ex. 43A, B, C and D as a letter from Mr. Lingeman to Mr. Johnson enclosing the memrandum which refers to Com. Ex. 42A to S. These papers evidently came from among those that were delivered to the witness after his discharge.

Mr. Wooden: I offer them for the record, Your Honor.

Mr. Leisure: May I ask you a question?

Examiner Norwood: Yes.

By Mr. Leisure:

Q. Was the memorandum in this letter enclosed with the letter when it was mailed to Mr. Johnson, Mr. Cree, do you know?

A. It evidently was.

Q. You say "evidently". When did you first see the memorandum?

A. This memorandum (indicating)?

Q. Yes.

A. Well, I am pretty sure that I composed that memorandum.

Q. You wrote it at that time?

A. I do not think I signed it. I signed some and some I did not.

Q. Where did these copies come from, the copy of the letter and copy of the memorandum? Is this part of the papers delivered from your files?

A. From my desk, yes.

Mr. Leisure: Subject to our motion, there is no
741 objection.

(COM. EX. 43-A, 43-B, 43-C and 43-D was offered and received in evidence.)

By Mr. Wooden:

Q. Do you know anything about this statement of Mr. Lingeman's in Exhibit 43-A where he tells Mr. Johnson that you have drafted the attached memorandum and says, "We think it about time that Huron did something constructive and we would be glad to follow them. This summer we went along 100 per cent with them, but, needless to say, when the Huron Company goes along as it has and with conditions no better in spite of our very evident efforts to show our sincerity, we feel very discouraged." Do you know anything about that of your own knowledge?

A. I would not want to comment on that. I know the general nature of the thought, probably.

Q. Well, what was the general nature of the situation that is referred to there?

A. Well, it would be criticism of the Huron Company in their prices.

Q. Do you have reference to their establishing this Muskegon base?

A. That was no doubt the thought in his mind when
742 he made that statement.

Mr. Wooden: I ask to have these marked Commission's Exhibits 44-A and 44-B.

(The documents referred to were thereupon marked for identification "Commission's Exhibits 44-A and 44-B.")

By Mr. Wooden:

Q. I am showing you now papers marked Commission's Exhibits 44-A and 44-B for identification. Will you state what they are?

A. This was written by Mr. Johnson and it describes the policies.

Q. Well, it is headed "Policies of the Aetna Portland Cement Company", is it?

A. Yes.

Q. You say it was written by Mr. Johnson?

A. Yes.

Q. How do you know?

A. I say I am under the impression it was written by him. I did not see him write it.

Q. Did you see him use it at any time?

A. Yes.

Q. In what way was it used?

A. Well, I heard him read it.

Q. Where?

743 A. At a meeting in Chicago.

Q. Attended by whom?

A. Several of the different cement manufacturers. I do not know as I could name all of them.

Q. Name as many as you can.

744 A. Mr. Colburn represented the Marquette Company; Mr. Rooney represented the Huron Company; Mr. J. B. Johns represented the Medusa Company; Mr. Russell represented the Peerless Company.

Mr. Zimmerman: Represented what company?

Mr. Wooden: The Peerless.

The Witness: The Peerless Company. Mr. Lucas represented the Petoskey Company, and Mr. Calvin represented the—let me see—he was with the Consolidated.

By Mr. Wooden:

Q. Was anyone there from Universal?

A. I can not remember anybody from the Universal. I think the Wabash man, Mr. Jennings, came in.

Mr. Wooden: I offer Exhibits 44-A and 44-B in evidence, Your Honor.

Examiner Norwood: Did you say when this meeting was?

Mr. Leisure: No, he did not.

Examiner Norwood: Please tell us about when.

The Witness: It was around about this time, about, let me see, two years ago, I believe.

745 By Mr. Wooden:

Q. You mean about this time of year two years ago?

A. Yes.

Mr. Leisure: May I ask a question about the exhibit, Your Honor?

Examiner Norwood: Yes.

By Mr. Leisure:

Q. When did you first see this memorandum, Mr. Cree?

A. At that meeting.

Q. At the meeting?
A. Yes, sir.
Q. And who showed it to you then?
A. Mr. Johnson.
Q. And you were present when he read it?
A. I was.
Mr. Leisure: No objection, subject to our motion.
(COM. EX. 44-A and 44-B was offered and received in evidence.)
Mr. Wooden: Your Honor, here is another case where I want this to go on the transcript. (Reading).

"December 6, 1935.

"Policies of the Aetna Portland Cement Company.
746 "Production

We shall run our mills full time or half time or shut them partly down, in accordance with our judgment, as our needs and our customers' needs for cement demand.

"We realize that there is danger in over-production, and at this particular time we are running our Fenton plant practically none at all—only a very few months in the year—and at the present time it is closed.

"Our Bay City plant we are running with a reduction of one kiln, and we shall continue to increase or decrease our production as our best judgment dictates.

"We do not intend to tear down or destroy the industry in which we are identified. It is our desire to build up and strengthen.

"We intend, when entering a new field where we have not sold before, not to disturb in any way the then present price conditions or the general conditions of that locality that have been established by the industry prior to our entering.

"We do intend to maintain our boats as a means of transportation for our cement and any other materials, to any places that we may wish to go.

"Warehouses

"Whenever we have a warehouse, we intend to sell our own goods by our own men, and do our own billing.
747 "Whether or not these warehouses are profitable, is a matter which we must carefully watch.

"We have one distributor only, and that is the Limestone Products Company. We have a contract with these

people which will run for some time yet, and which we will honor.

"We will not add any more distributors without first the approval of the General Manager and the President.

"We do sell to dealers. They buy our cement and pay for it promptly, and it then becomes their property. It will, however, be our desire to have them maintain prices and conditions in the various localities where they operate, and confine themselves to the districts in which they are entitled to operate.

"It is our intention to sell cement in any field which we may desire to go into, but in doing so, again we will maintain the general market price and trade conditions and practices that are in vogue in that locality (wherever we may enter), when other brands of cement are being sold there. Again, it is our intention not to tear down but to be constructive and build up.

"A copy of our letter, dated August 15, 1934, to the Indiana Builders Supply Company should demonstrate what we propose to do; and this same policy shall be adhered to in entering any new locality.

748 "In quoting on cement, we desire and wish to adhere to the general market price, which is now even too low. By so doing, we well realize that we may now and then lose an order, but we would rather lose an order once in a while than to pull down the whole price structure, although we can not sit idly by and let it all go that way, as we do not intend to lose our good customers, and we necessarily must have a reasonable production, and we can ask for no more than a reasonable production and sales at this time.

"We have agreed that in shipping cement into the Upper Peninsula, it shall go in carload lots, and no truck deliveries will be made.

"See our filing, dated Nov. 5, 1935.

"These should be definite rules, which the General Manager will see are adhered to. Any change in these rules should be approved by the General Manager and the President."

749 The witness identified Com. Ex. 45-A, B, C and D as a copy of a letter sent to Mr. Lingeman by Mr. Johnson. The letter came into witness' possession in the same manner as all the rest of the correspondence, that is, it was among the papers that were sent to his house

after he was discharged. He said that some of these papers contain his handwriting. He can not tell about this "(indicating)". Maybe that is Lingeman's. He is pretty sure that the written words on page three and on page four were done by him. The checking, the witness thinks, may be Lingeman's, but he cannot say whether
750 he put those checks on there or not. He would say that all the writen words are in his handwriting with few exceptions. Those handwritten comments on the paper were placed by the witness shortly after he received it in order to enable him to check up on his own thought against competition and also to correct memoranda for Mr. Johnson who desired them.

Mr. Wooden: I offer the papers in evidence, Your Honor.

Mr. Leisure: We have no objection, subject to our motion.

(COM. EX. 45-A, 45-B, 45-C and 45-D was offered and received in evidence.)

751 Mr. Wooden: This is another case, Your Honor, in which I want the transcript to show the contents of this exhibit. (Reading:)

"Boston, Mass., Dec. 13, 1935

"Mr. O. J. Lingeman, Vice Pres. & Gen. Mgr.,
Aetna Portland Cement Company,
2349 Union Guardian Bldg.,
Detroit, Michigan.

"Dear Oscar:

I arrived here safely, this morning, at 11:30. It is now quarter of twelve, and I am dictating a few things which are still fresh in my mind, and while they are fresh, I wish to get them on record, for you to follow out definitely, completely and as promptly as possible.

"I now refer you to our policies, as dated December 6, which were read at the meeting the other day; and for your information I will say that there were present at that meeting the following men:

"Mr. Ben Calvin and Mr. William Storey, of the Consolidated Cement Co., Jackson, Mich.

"Mr. J. B. John and Mr. Harry Lucas, of the Medusa and Petoskey Cement Companies.

752 "Mr. Burt Rooney of the Huron Cement Co.,
"Mr. Frank Mooney, Sales Manager of the Wolverine Cement Company,
"Mr. Archie Conkrite (who came in later), of the Universal Atlas,
"Mr. Jennings of the Wabash (who likewise came in afterwards),
"Mr. D. C. Colburn, Vice Pres. of the Marquette Co.,
"Mr. William Russell and Mr. Luck of the Peerless,
"Mr. F. R. Johnson, Mr. Oscar Lingeman and Mr. Harold Cree, of the Aetna Company.
"You will remember that at that meeting all things were discussed clearly.
"I call your attention to the second page—first paragraph—as it was read at that meeting. Now in that first paragraph, we speak about selling to dealers. It is clearly understood that we sell to a dealer at our regular price. What profit he makes is a matter up to him, and we will not attempt to concern ourselves about that, but he must not deliver that cement, except in his own locality; and he must confine himself to the districts in which he is entitled to operate. If he cannot do that, or will not do that, then we must tell him definitely that we cannot sell him.
"Now this is a matter of much importance, and I
753 want you and your organization to start at once to see these people, whether it is McCall or who; and no better work can be done than to have Smullens, Sherry, Harold, and yourself if necessary, call on these people and explain the matter clearly to them, so that promised we will do, and we will; and it is up to you, Oscar, to see that it is done; and then when it is done, report to me, but this should not be allowed to drag, and Harold can report to you, as that is his line of operation, and I know he will."

By Mr. Wooden:

Q. Let me ask a question or two in there. Who was McCall?

A. A dealer in Greater Detroit, or Ferndale, Michigan.

Q. Is he the concern that was complained of for getting out of his territory and cutting prices on Government land grant bids?

A. That is correct.

Q. Who was Smullens?

A. The salesman for the Aetna Company.
Q. Who is Sherry?
A. Another salesman for the Aetna Company.
Q. And Harold is yourself?
A. That is myself.

Mr. Wooden (reading): "The second thing to be taken up is this question of warehouse situation:

754 "Now then, in looking at my memorandums, I am referring to the letter which you wrote me, dated Dec. 5, in which you gave me the names of the different warehouses, and I also refer to the memorandum prepared by Albert O'Neal, dated Nov. 1, giving me certain detailed information."

By Mr. Wooden:

Q. Who was Mr. O'Neal?
A. He was the bookkeeper in the Aetna Company.
Q. Do you know what the memorandum was that was referred to there?
A. I can not recall is.

Mr. Wooden (reading): "As to these warehouses, there is no use of discussing Menominee, Green Bay or Racine, because those are all under Mr. Smith's jurisdiction, and we are going ahead with him, and that settles it; but Harold should get in touch with Mr. Smith (or you should) and ask him to cooperate with us just one hundred per cent, and not to do anything in any way that would look as though he were giving any advantage to any buyer of cement, either in the way of commissions or an added amount of other materials. I can't believe Mr. Smith would do that. I enjoyed meeting him—I think he is very shrewd, very keen, very smart, and he is likewise, in my opinion, very honorable.

755 "Other concerns who have had a distributor (as Mr. Smith) have not had good results—perhaps that is because they did not have a good man; so please ask Mr. Smith to assist us in every way, so that we can build up higher prices in the market there, and in Michigan generally, because we have given our word that we will not tear down any price structure—we will build it up—and we don't care if we do lose an order now and then; but we do want to sell every barrel of cement that we can, at the full price, and no advantages to be given to the purchaser in any way—trucking or anything else;

not that I think he is doing it, but I do want to have him be careful, and be careful with him men.

"You know, we in our organization have made mistakes when we should not, and shame on us.

"Therefore, those three places are taken care of."

By Mr. Wooden:

Q. What three places do you understand him to refer to there?

A. Well, I imagine that refers to the Menominee, Green Bay and Racine warehouses.

Mr. Wooden: Heading "Cleveland.

"See J. B. John about this. Have that O. K.'d, and as soon as it is arranged, write me, and ask Mr. John to write me."

By Mr. Wooden:

756 Q. Will you explain what the Cleveland situation was as there mentioned?

A. Well, only that we had a warehouse down there that was operated by a man named Bramley, a paving contractor, and we naturally enjoyed his business, and that was an objection, I believe.

Q. Did you ever see Mr. Johns about it?

A. No.

Q. Do you know whether Mr. Lingeman did?

A. Of course, I cannot tell that, but I don't think so.

Q. Opposite that statement in the letter, you have written in longhand, "elimination of Bramley." Is that your warehouse man, I believe you said?

A. That is the warehouse man.

Q. What did you mean by eliminating him?

A. Well, there was criticism down there that we were selling Bramley and operating there a warehouse that he owned, which I suppose was based upon the fact that we automatically controlled that particular business.

Q. Was Bramley ever eliminated?

A. Not while I was with the company.

Q. Continuing the reading: "Port Huron—see Mr. Russell, and get that straightened out; and when it is, and it is O. K. for both of you, write me and have Russell write me." What was the situation at Port Huron?

757 A. Well, at Port Huron, the situation, I believe,

was similar, only the name of the fellow there was Boschen. I believe that has been previously mentioned.

Q. Did you get that straightened out as Mr. Johnson directed?

A. No.

Q. Who is Mr. Russell?

A. Why, I believe his capacity was first as receiver for the Peerless Company, and then later—I believe he is now manager of the Peerless Company.

Q. Continuing to read: "As you see, I have started on this thing and I am going through with it. Detroit is O. K." What did you understand by that?

A. That theory was based, no doubt, on the fact that we were operating under the Aetna Portland Cement Company at Detroit, which seemed to be without criticism. I don't know. I cannot understand—that was the first warehouse we had, and probably that was the reason that it was O. K. The trucking center in Detroit naturally would necessitate the company the Aetna Company, to have a man down there to necessitate any kind of tonnage.

Q. There is a question mark after "Detroit" there. Is that your question mark?

A. I would say that is mine.

Q. Why did you question it?

758 A. Well, I had the thought in mind evidently at that time—you see, we had a plant at Fenton. Our original plant was still going, and I imagine it ought to be going now, it is a darned good plant. And only about 45 miles from Detroit, the outskirts, and about 55 miles from downtown at the water front, and I figured that maybe we could salvage a little extra money for the Aetna Company by eliminating the Detroit warehouse and working directly from Fenton, from the Fenton mill to Detroit and environment. That was no doubt what that meant.

Q. Continuing: "Sault St. Marie—withdraw from there." And a pencil note alongside there, "Done." Is that your pencil note?

A. I said it was; I believe it is.

Q. You did then withdraw from Sault St. Marie?

A. Yes, sir. We did that.

Q. Why did the Aetna Company withdraw from Sault St. Marie?

A. Well, Mr. Johnson wanted us to withdraw; that is about all I can say.

Q. Do you know why he wanted you to withdraw?

A. Really no, unless it is conforming with the policies that he has in mind.

Q. Continuing: "Grand Haven and Toledo. See what you can do in both places that will be satisfactory. 759 It may be wise to withdraw from both of those places. These are the matters which are most important at the moment. There are some other things which I shall take up with you later on." Opposite that in pencil writing, "Can't do anything. Withdraw or not to withdraw." What did you do?

A. What points did you mention?

Q. Grand Haven and Toledo.

A. Did not do anything.

Q. (Continuing.) "Warehouses and distributors—please do not have any more warehouses without first consulting me; I prefer no more—we are likely to spread out too thin." Opposite that in pencil note, "Pay as we go." What does that mean?

A. Well, it means for illustration, that the particular operation at Grand Haven was put through a very fine gentleman by the name of Nat Robbins, quite influential there, and owning the only dock and warehouse available, and he warehoused our cement, and we paid him naturally for that stevedoring and warehousing, and also the trucker that worked from his warehouse, we paid that trucker the particular rates, so the combination of the whole thing, the price per barrel on unloading and warehousing plus the trucking rate, allowed us to realize that whatever business we were taking, it was with our own full knowledge, and we were then paying as we went along, and if it was not satisfactory, that was our 760 own fault and there was no one else to blame.

Q. You mean that the business was carrying itself or what?

A. I mean that if we took business, we realized how much it would cost us to take that particular business, and that we were not bound for any particular contract. It was the per barrel pay as you go.

Q. (Continuing.) "As to distributors, have no more of them unless we all get together and decide it is for the best interests.

"Cost of doing business from warehouses—there was so much discussion on this point that I made it my personal

business to inquire of all the presidents that I could get hold of (and men who knew the details of their business) regarding storage warehouses and what had been their experiences. I talked with such men as Mr. Charles Hogan, president of the International Cement Company, and Archie Conkrite and Mr. Stone, vice presidents of the Universal Atlas, Mr. Joe Young, president of the Lehigh Portland Cement Company, and Mr. Ben Calvin of the Consolidated, and many others; and universally they all said that they had found by years of experience that it cost them too much money to establish and continue warehousing and do business from those various points. Especially definite in that statement was Mr. Charles Hogan, who does not operate in Michigan or in our locality (and neither does Mr. Joe Young of the Lehigh);
761 and both of them said that they felt we would find it just as they had found out, that it cost too much money to do it. Therefore, we must analyze this situation some time between now and spring, so as to know 'where we are at.'

"I must say, with the earnestness of the answers that I received from these gentlemen, and with such figures as we have, I am not sure that we are on the right track."

There is a pencil notation following along there, "What of that." Is that yours?

A. Well, as I said before, evidently it is. What is the wording "what of that?"

Q. Yes. "What of that." What did you mean by your notation there?

A. Let me group that together there. (Examining paper.) It was just a criticism of that particular paragraph.

Q. In other words, you did not agree with the reasoning involved?

A. Oh, no, no.

Q. Did you report your disagreement with it to Mr. Johnson?

A. I cannot say that I did unless I made a memorandum on it to give to Mr. Lingeman.

Q. Was this the only time the subject was ever up?

A. The only time?

Q. Yes.

A. That was evidently the first time. Now, I don't
762 know—this is a long while, and time marches on.

Q. Unless I am confused, we have had prior instances of the question of warehousing being discussed?

A. Well, that particular phase I thought you meant.

Q. Well, the cost of doing business through warehouses. Let us get along: "I shall expect that you shall take up this work immediately; it must not drag. It seems to me that you and Harold should do this work—it is not for me to do it; it is part of your general, everyday business affairs. It is going to be essentially necessary to live in accordance with these policies that I have established, which you two have already approved of; and you know that I gave these gentlemen my word that we would live up to them. I shall hope and expect that you will get right to work at this immediately. I believe it is the intention of you and Harold to work in accordance with my plans as laid down; in fact I might say it is very decidedly essential for your future value to this organization to do so, and I don't believe you will disappoint me. F. R. Johnson, President."

Mr. Cree, what was the relationship between the Aetna Company and the Limestone Products Company that has been referred to so many times in the documents we have seen? The business relationship?

A. The Limestone Products Company was developed and appointed by me as our particular distributors.

763 Q. Were they the usual retail dealers in cement?

A. They were distributors representing the distribution of our cement in that particular locality that we operated, starting first at Menominee, Michigan, then following to Green Bay after the success of the operation seemed to be assured, and then in turn following to Racine, Wisconsin.

Q. Did they buy the cement from you outright?

A. No, they acted as our distributors and followed the line of thought that I would express to them as sales manager of the company, the Aetna Portland Cement Company, and practically operated as well as we could and under their fine organization, I might say, in some cases maybe a little better, because they had complete cooperation and coordination of activity over there.

Q. What class of customers of trade did the Limestone Products Company sell to?

A. As the Aetna Company would sell if they operated it. They would sell, in other words, to the dealer or to

the contractor as the case would probably be, according to their particular own judgment.

Q. How was the Limestone Products Company compensated for its services in selling your cement?

A. I think that they are still doing business with them. Do I have to mention that? Do you ask me that question?

Q. I asked you how they were compensated when
764 they were selling your cement?

A. At my particular time?

Mr. Leisure: If your Honor please, I think if there is a contract between them, it should be produced.

Mr. Wooden: I am not going into the contract.

The Witness: They have a contract.

Mr. Wooden: He knows as sales manager how they were compensated.

Examiner Norwood: I think they can show the details of the way they did business.

The Witness: Well, they were compensated on a pay-as-you-go basis, so much per barrel, so that we knew how much it cost us to ship the cement to Menominee or Green Bay or Racine, and then we deliver.

Br. Mr. Wooden:

Q. Did you consider that you had the ownership of the cement that was being handled by the Limestone Products Company? Was it their cement or yours that they were selling?

A. Well, it was our cement.

Mr. Leisure: I think the record should show whether they were agents or what the relationship was. It does not make it clear on the record.

The Witness: Pardon me, didn't I say they were distributors of our cement?

765 Examiner Norwood: If we have the particulars, we may be able to determine.

By Mr. Wooden:

Q. But you also said they did not buy your cement, is that right?

A. No, they distributed our cement, and as they did, we paid them for their particular service of unloading, warehousing and re-distributing by truck or train.

Q. So much per barrel?

A. So much per barrel, paying as we go.

The witness identified Com. Ex. 46 as a memorandum

prepared by him. It has his signature on it or a notation at the top, and he can tell by the wording. There is not any date on "this thing", but it was prepared around the time after Aetna's development of the Limestone Products operation in Wisconsin.

Mr. Leisure: Which was about when? Does the
766 record show when that was?

Examiner Norwood: About when was that? The Witness that was stated yesterday. It is a matter of record. Well, it would be approximately three years ago, I imagine.

By Mr. Wooden:

Q. What was your purpose in preparing this memorandum?

A. As I have stated before, to have it as a matter of record for myself, and the better carrying on and protecting the business of the Aetna Portland Cement Company, and the better help of Mr. Lingeman, the general manager, to convey to Mr. Johnson, the president of the company, the information as I saw it.

Q. I notice there is only one sheet here, and apparently it is not a finished statement. Can you account for that?

A. Well, there evidently was another sheet, and when you grabbed these papers, you did not get the other sheet.

Q. When you say when we grabbed these papers, what do you mean?

A. When you came to my house and took them.

Q. Do you mean Mr. McDonald?

A. Yes.

Q. Did he take them without your consent?

A. Well, I gave him my consent.

Mr. Wooden: I offer it in evidence.

769 Examiner Norwood: I think that possibly this might throw some light on this witness' state of mind and show what actuated him in some of these transactions. I think it should be admitted for that purpose only. I do not see how it is going to hurt anybody.

770 It is received as Commission's Exhibit No. 46.

(COM. EX. 46 was offered and received in evidence.)

771 Examiner Norwood: The hearing will come to order. I have just had a chance to read this Exhibit 46 and I really do not think that it is admissible. When I

ruled on it before I had read part of it. I think I will reverse my decision on that and sustain the objection.

772 The witness identified Com. Ex. 47 C, D, E and F as a typewritten memorandum dated May 1, 1936, written by him to "Mr. Lingeman, Mr. Johnson";

773 Com. Ex. 47 A and 47 B as a pencil memorandum applying to some of the subjects no doubt mentioned in this communication of May 1. The pencil memorandum was prepared in witness' writing and contains certain numbers under which he wrote about various subjects. Those numbers correspond to similar numbers that appear in the typewritten memorandum. There are numbers "here" that would seem to correspond with this pencil memorandum. The purpose in preparing the pencil memorandum was evidently to enlighten Mr. Lingeman as to the typewritten memorandum. The numbers and the topics under the numbers on both the pencil memorandum and typewritten memorandum evidently cor-

774 respond. There is a No. 2 on the typewritten memorandum. The pencil memorandum was evidently made about the same time as the typewritten memorandum; before or after, the witness does not know which. A careful reading probably would indicate that.

Mr. Wooden: I offer that paper in evidence.

Mr. Leisure: May I ask a question?

Examiner Norwood: Yes.

By Mr. Leisure:

Q. These numbers that you referred to at the bottom of the page, did you make these large numbers, Mr. Cree? Are those your numbers?

A. No, I had reference to this henscratch there (indicating).

Mr. Wooden: I can answer that for you.

Mr. Leisure: Will you, please?

Mr. Wooden: They are just a numbering machine number that were placed on the things by the Commission.

Mr. Leisure: Are these Commission numbers (indicating)?

775 Mr. Wooden: Yes.

Mr. Leisure: Subject to our motion, we have no objection.

(COM. EX. 47-A, 47-B, 47-C, 47-D, 47-E and 47-F, were offered and received in evidence.)

Mr. Wooden: This exhibit, 47-C, 47-D, E and F, contains reference to Mr. Johnson's letter of April 27, to Mr. Lingeman, I assume, and to Mr. Lingeman's letter of April 8 to Mr. Johnson. I would like to serve notice for the production of those letters, if possible.

Mr. Herschberger: What years are you talking about?

Mr. Wooden: 1936.

Mr. Leisure: I did not catch who the letters were between, Mr. Wooden.

Mr. Wooden: Between Johnson and Lingeman. One letter from Johnson to Lingeman and the other from Mr. Lingeman to Mr. Johnson.

Mr. Leisure: Johnson to Lingeman?

Mr. Wooden: Johnson to Lingeman dated April 27 and Lingeman to Johnson dated April 8.

Mr. Leisure: If we have them we will produce them, Your Honor. May I ask just a question there?

776 By Mr. Leisure:

Q. Were those letters included in the files which were sent to you, these letters which counsel is now asking for?

A. I presume they were.

Q. I mean the ones he is asking us to produce now, from Mr. Johnson to Mr. Lingeman and from Mr. Lingeman to Mr. Johnson?

A. Those letters?

Q. Were they included in the file that was turned over to you?

A. I do not recall seeing them.

Mr. Wooden: Of course in asking for these letters I assume they will either be produced or their absence accounted for.

By Mr. Wooden:

Q. Referring to page 3 of Commission's Exhibit 47-E, the second paragraph, you say, "We are referring now to Mr. John and Mr. Conkrite relative to the sending of a letter. I suggest the consideration of a telephone call rather than anything like this in writing." What was the meaning of your statement there? What was the reason that you were suggesting a telephone call rather than putting it in writing?

A. Well, I evidently thought he could better talk to me personally that way than to write it and maybe get mixed

up in his writings, and so forth, and I always thought
777 that was the better way to do. It was merely a suggestion.

Q. You go on to say in another paragraph, "Mr. Johnson speaks of his letter marked Exhibit A and again I suggest a telephone call. This letter, even without a name attached, would be evidently applicable to our company only." Had someone suggested to you—

Mr. Leisure (interrupting): No, I would rather counsel just ask him what he meant by the writing instead of suggesting answers.

Mr. Wooden: All right, I was not suggesting answers.

By Mr. Wooden:

Q. What did you mean by the writing there that I just read?

A. You mean the sending of the letter without a name attached?

Q. Without a name attached, "that would be evidently applicable to your company only."

A. Well, I always thought that the sending of a letter by mail, that it is a proper thing to put your John Hancock on it.

Q. Then why, all the more I ask you, were you talking about a letter without a name attached?

A. I have seen letters come into the office without a signiture but the name attached.

Q. Will you enlarge on that? Letters from whom
778 without a name attached?

Mr. Leisure: I object to that question because if the letter came into the office through the mail, as he stated, without a name attached obviously he is not in a position to testify from whom the letter came.

Mr. Wooden: Maybe he is.

Mr. Leisure: I object to the question.

Mr. Wooden: Maybe he is. That does not follow.

Examiner Norwood: Let him explain it. Objection overruled.

The Witness: What was the question?

Mr. Wooden: Read it, please.

(The question was read.)

A. Well, I must say, since you ask me that question, I have seen letters come into our office without a signature and with a name attached.

By Mr. Wooden:

Q. With a name attached?

A. Attached on a slip of paper, or card, something like that. Just what particular letters or what particular people I could not say.

Q. Well, do you remember some cards attached to such letters as to whom, in general, such letters were received from?

A. Well, I must say I have seen letters come in, naturally letters come in that way, coming in from—I have
779 seen letters that were of competitors, and different letters, but any one particular letter I can not say.

Q. You say now, as I understand, that you saw competitors' letters come in without the name or signature?

A. I have.

Q. How did you know them to be competitive letters?

A. Well, I say competitive letters, I perhaps have so assumed that they were because of the particular name attached, that would harmonize with what I thought would originate from that particular name.

Q. How were the names attached, in what form?

A. I believe I stated either a card or slip.

Q. Business card or what kind of a card?

A. I have seen business cards, I believe.

Q. That contained the name of an individual as well as of a company?

A. Yes.

Mr. Leisure: Now I move that all this testimony be stricken unless the witness can testify that these names were names of respondents, because we are not bound here by advertisements that come from others than these respondents. I move to strike this whole testimony out unless it is in some way connected with this case.

By Mr. Wooden:

Q. Do I understand, Mr. Cree, that these letters
780 with names attached on a card, or something like that, were received from men whom you knew as competitors in the cement business?

Mr. Leisure: Now I object to that question. He can ask what the letter contained and what this witness saw, what he heard, but he can not ask him for his assumption as to who the letter came from.

Examiner Norwood: He can say whom he thought it was from.

Mr. Leisure: If there is any basis for his saying whom he thought it was from.

Mr. Wooden: He said they had a card attached to them.

Mr. Leisure: If the question is put properly I will not object at all.

By Mr. Wooden:

Q. Did you understand the card to indicate the sender of such letters?

Mr. Zimmerman: I object. I think it makes no difference what this witness understood. This is a question of fact, not what this witness inferred.

Examiner Norwood: Off the record.

(Discussion off the record.)

781 Examiner Norwood: Do you mean by that that you received letters in their envelopes postmarked in such a way that they indicated to you that they had come from some particular competitor?

The Witness: Yes.

Examiner Norwood: You can tell what those marks were, and you can tell about the letterheads and the circumstances, and whether or not it was a reply to some letter from you. I think you can bring out the facts on that. In the present form of the question, the objection is sustained.

By Mr. Wooden:

Q. Did you send out some letters to competitors in the same way without signing them?

A. No, I never have, and I don't know of anybody else in our Detroit office that has ever done that.

Q. During the time you were there?

A. That is right.

Q. I am asking you again how you knew that some of these unsigned letters came from competitors?

A. I would assume that by the card or slip attached with the particular name on.

Q. Did the letters themselves,—were they addressed to the Aetna Company?

A. It would be pretty hard for me to tell in the 782 particular case. There was a lot of correspondence coming in in a year's time.

Q. Were some of them in the form of memoranda without being addressed to any one?

Mr. Leisure: This is important, if your Honor please. I think the witness should not be led here by counsel. The general basis of the testimony as brought out by your Honor's questions is that this witness received some memoranda or letters with cards attached. The counsel can exhaust his recollection on that, but to suggest certain things he might have found that this witness has not intimated, I do not think is proper examination.

Examiner Norwood: I do not think the leading is harmful on that.

Mr. Leisure: He has not connected it up in any way with any of the respondents. He has said, "competitors" without saying who they are.

Examiner Norwood: He is trying to bring out that information. I do not think he is leading improperly.

By Mr. Wooden:

Q. Will you answer the question?

Examiner Norwood: Read the question.

(The question is read.)

The Witness: Yes.

783 By Mr. Wooden:

Q. Can you name any individuals from whom you remember having received such communications with a card attached to the communication?

A. No, I could not definitely recall any particular instance.

Q. Did you receive such communications with cards attached from the competitors with whom you were having these conferences as described in your testimony and in the exhibits?

784 The Witness: I would say yes.

Examiner Norwood: How did you know they were from them?

The Witness: Because of the fact that being interested in this particular district, the mail that I would get would originate from a source in this particular district. Very seldom would I hear from the Pacific Coast or other points, because we were not that far-reaching in our production and shipments.

By Mr. Wooden:

Q. When did that practice begin, as far as you know?

A. I don't know.

Q. I mean, when did it begin with reference to these conferences that have been the subject of your testimony and described in the memoranda and letters that you have identified.

785 Q. Did this practice of receiving unsigned letters with a business card attached, did that come out prior 786 to this 1933-1936 period?

A. Prior to what?

Q. Prior to it, or when did it with reference to that period?

A. Well, it might have been prevalent before that particular period. I could not tell the originating date of that so-called practice.

Q. So far as the Aetna Company is concerned, did that practice exist before 1933?

A. I might say not to such an extent.

Q. I beg your pardon?

A. I might say it might have become more prevalent during that period.

Q. Do you mean, then, that the practice was in existence prior to 1933?

A. I imagine it was; I think it was.

Q. I don't want your imagination; I want your recollection.

A. My recollection is that it was.

Q. On page 4 of Commission's Exhibit 47, you say "Mr. Johnson goes on and refers to the government investigation in Washington. It is rather difficult to say that nothing will come out of this. I think in our case we are pretty well protected and if anything difficult did arise from Washington, I do believe that we would see an added advantage in our various warehouse locations.". What were you referring to there?

787 A. That was in reference to this legislation as to basing price.

Q. Do you mean the so-called anti-basing point bill introduced by Senator Wheeler?

A. The Patman bill, is it?

Q. No, I think not. Do you mean the bill that had to do with the legislation on basing point?

Mr. Leisure: Let us have him say what he means, Mr. Wooden, please. He wrote it and he ought to be able to explain it.

By Mr. Wooden:

Q. May 1, 1936.

A. Well, that had reference to the potential possibilities of supplying those particular warehouses with maybe distinct prices for those particular locations.

Q. Did you believe that if that legislation were passed, the Aetna Company would be pretty well protected, as you say here?

A. I evidently did believe it at that time.

Q. The last paragraph of Exhibit 47, 47-F states: "Mr. Johnson closes with the remark as to Mr. John and Mr. Conkrite, I hope that if this happens it will be by telephone." Why did you hope that would be by telephone?

788 A. Why, I evidently thought that was the proper way to advise him—Mr. Johnson—to conduct the business that he was thinking about.

Q. What was the remark as to Mr. Johnson and Mr. Conkrite that is referred to?

A. I cannot recall that.

Q. You then say "In speaking about telephone conversations, the last remark I heard from Mr. Cronkite was to the effect 'the advance in price in lower Michigan is up to you smaller mills, and you should get after the Huron Company.'" Can you say when and where you heard Mr. Cronkrite make that remark?

A. I remember that as a telephone conversation.

789 The witness identified Com. Ex. 48 as a telegram dated May 28, 1936 from Mr. Lingeman to him while the witness was evidently in Menominee. The telegram contains some handwriting in ink placed thereon by the witness after a meeting which was held in his office in Detroit and attended by Mr. Pierson, the witness and a man named Fuelling from Indiana who was traveling that territory for witness. Mr. Pierson was associated with the international Cement Company and the witness believes his office was located in Indianapolis although he was never there.

Mr. Wooden: I offer the paper for the record as Commission's Exhibit No. 48.

Mr. Leisure: Are you offering the writing on the back also, Mr. Woode ?

Mr. Wooden: No. I don't think that has anything to do with the case.

Mr. Leisure: Subject to our motion, I have no objection to the body of the telegram, but to the notations made on the telegram, I object that they are incompetent, im-
790 material and irrelevant, no proper basis being laid showing they were made in the regular course of business, and they are not binding on any of the respondents.

Examiner Norwood: That notation was made by this witness, wasn't it?

Mr. Leisure: He says yes.

Mr. Wooden: At the approximate time.

Examiner Norwood: Yes. He has given the circumstances. You testify that those are correct, do you? The notations that are made on there, they are true?

The Witness: I do.

791 (COM. EX. 48 was offered and received in evidence.)

By Mr. Wooden:

Q. I note your ink handwritten note on this telegram reads: "Pierson said we could ship to only three towns in Indiana to Farm Bureau." Why did you put that on that telegram; what was the reason for stating that on that telegram?

A. Well, as a notation as to the result of that particular meeting that we were to confine our shipments without criticisms from others, to those three particular points. I don't know what towns they were. There were three towns down there that were classified as so-called dealers, or something in a bigger light.

Mr. Wooden: Off the record—

(Discussion off the record.)

By Mr. Wooden:

Q. Mr. Cree, I am showing you a collection of papers (numbered Commission's Exhibits 49 to 81 for identification) and will ask you to state what they are?

A. Well, the first is a letter from this man Fuelling I think from the wording here, and it is evidently relevant to this Farm Bureau thing.

792 Q. You salesman?

A. Yes. I just read the first paragraph.

Mr. Wooden: Do you want him to go into it as to each one?

Examiner Norwood: You can describe them all together if you can.

Mr. Wooden: They are all relating to the Farm Bureau matter.

The Witness: Your Honor, I might say that all of this junk here has to do with the shipment and non-shipment of of the Aetna Portland Cement to the Indiana State Farm Bureau. It was a controversy resulting in the first meeting that is spoken of with Pierson, and then these letters.

Examiner Norwood: They consist of copies of letters from you to them, and originals of their letters?

The Witness: Yes, sir.

Examiner Norwood: Are there any copies of letters from competitors to you with regard to the transaction?

Mr. Wooden: I think not.

The Witness: There are some orders here, too. (Examining papers.)

Examiner Norwood: Very well.

Mr. Wooden: I will make the offer just to make the record complete and let it stand pending the exami-
793 nation by respondents' counsel.

794 Examiner Norwood: You may proceed. Those were papers marked for identification Commission's Exhibits 49 to 81, inclusive. They were offered in evidence, were they not?

Mr. Leisure: No, they were just marked identification.

By Mr. Wooden:

Q. Do you recall, Mr. Cree, with reference to the Indiana Farm Bureau, to which these papers relate that you have just identified in general, what the objections were to selling the Indiana Farm Bureau?

795 By Examiner Norwood:

Q. Were they objections from respondents? Were they objections from some of these companies that are named in this case?

A. Yes, they were.

Q. Who were they?

A. Well, that correspondence I think refers to the International Cement Company.

Q. Were there some from some other companies too?

A. I think there was a general objection or criticism from other companies.

Mr. Leisure: I move that answer be stricken out. These respondents are not bound by what this witness thinks. What he saw, what he heard, what he did may be material.

Examiner Norwood: Motion allowed, as far as the answer to my question is concerned.

Now as to the counsel's previous question, just as to what those objections were, he may state.

Mr. Wooden: I meant the nature of the objections.

The Witness: Well, the nature of the objections—

Mr. Leisure: Your Honor, it has not been specified yet whether the objections were made by anyone connected with this case.

Examiner Norwood: In answer to my question he named them.

796 Mr. Wooden: He named Pearson of the International and several others.

Mr. Leisure: Do I understand he is explaining the objections made by the International? If so, I have no objection.

Examiner Norwood: Confine your answer to the one you named.

The Witness: The objection raised was that outside the three towns suggested by Mr. Pearson that the Aetna Company should—he suggested that, he did not say it but he suggested that the Aetna Company would be in a better harmony,—I would put it that way,—if we adhered our sales in Indiana to those three towns mentioned; and, at the same time, we were shipping other places that, I believe were not so-called qualified dealers, according to his or their theory of a dealer, properly equipped to distribute Portland cement.

By Mr. Wooden:

Q. Will you state whether or not the Indiana Farm Bureau sold Aetna Cement for Government jobs in Indiana?

A. They did.

Q. Will you state whether or not the Aetna Company, in the summer of 1936, instructed them that they could have no more Aetna Cement for Government jobs?

A. May I ask you, do you mean to construe that

797 that no further bidding on Government jobs—

Q. (Interrupting) Yes, for Aetna cement by the Indiana Farm Bureau.

A. They were so instructed.

Mr. Leisure: It is not clear who instructed them. I do no know whether it is material or not to the case unless he asks the witness who gave the instructions.

By Mr. Wooden:

Q. Instructed by whom, Mr. Cree?

A. I believe that I am right in saying that I sent the letter down there. I will have to go through these to see if it has my signature or Mr. Lingeman's. I do not know.

Q. Why did you instruct the Indiana Farm Bureau to bid no more on Aetna Cement for Government jobs?

A. I might clarify that a little bit by adding that it was acceptable to, I might say, harmony, and that it would therefore eliminate criticism from competitors if we adhered to these particular towns. Now those dealers could —I imagine it would be all right for us to have shipped through them to the Government job in their particular locations. I would have to look at that letter. I remember the letter being sent about these three particular towns.

799 Q. I am now showing you Commission's Exhibit 83 for identification. Will you state what it is?

A. Well, this is a trucking plan gotten out by the Aetna Company to be sent around to the building supply trade, with the attached letter dated April 17, 1933.

Q. Is that the trucking plan that you have described in your testimony?

A. Well, I can not remember that. This is the trucking plan; I think it is different than the original description that you mentioned.

Q. Does it represent the trucking plan of the Aetna Company as of the date it was written?

A. It is the introduction of a new plan by the Aetna Company.

800 Mr. Wooden: All right. I will offer it in evidence. I offer Exhibits 83 and 83.

Mr. Leisure: No objection, subject to our motion.

Examiner Norwood: It may be received as Commission's Exhibits 83 and 84.

(COM. EX. 83 and 84 were offered and received in evidence.)

The witness identified Com. Ex. 85 A, B and C as a letter dictated August 10, 1933 and written on August 11,

801 1933 to Mr. Johnson by him. The witness said he was not there to sign it because he had gone to Milwaukee, so that the only time he read over the letter was when he dictated it. He has read that letter since but he did not read

it at the time. The stenographer signed it. The witness knows that it is his letter and that it was the one that was sent; Com. Ex. 86 A, B and C as a letter dated August 17, 1933 written by him; Com. Ex. 87 as a memorandum
802 written by him in the Union League Club one night in Chicago. Com. Ex. 87 was attached to Com. Ex. 86 A, B and C; Com. Ex. 88 A and B as a letter dated August 25, 1933 to Mr. Rene E. Paine of Boston, who was the principal stockholder in Aetna.

Mr. Wooden: I offer those papers so identified for the record, Your Honor.

Mr. Leisure: Your Honor, as to the first group of papers, 86-A, B and C—

Examiner Norwood: That is the second group. 85-A, B and C is the first.

Mr. Leisure: As to 85-A, B and C we have no objection, subject to our motion. As to 86-A, B and C, and 87 seems to be attached, as to those we have no objection, subject to our motion.

Examiner Norwood: All right.

Mr. Leisure: May I ask a question on Exhibit 88-A and B?

Examiner Norwood: Yes.

By Mr. Leisure:

Q. Mr. Cree, is that a carbon copy of the letter you sent to Mr. Paine?

A. That evidently is.

803 Q. Look at it. Does it look like a carbon copy? Is not that a copy of a copy?

A. It might be a copy of a copy.

Q. That is an original that you have in your hand, the typewriting is original, is it not?

A. Well, I am not sometimes familiar with those things. It does look like the original.

Q. Where did this paper come from, do you know? Was it in the group in your files?

A. That was evidently in the group. There was evidently another—let me see—this was a copy, no doubt, typewritten copy of the original.

Q. That is what I thought.

A. No doubt Mr. Lingeman has the copy and got this written copy from me, because I can see here that probably completes the sentence there on the opposite page (indicating).

Q. Was this letter written by you?

A. That was written by me.

Q. I did not understand what you said about Mr. Lingeman having the copy. Would not the copy be in your desk?

A. Let me see it. It is not signed, but I wrote the letter, I know that.

Q. Who was Mr. Paine?

A. Mr. Paine was a very fine gentleman from Boston and associated with the Aetna Company as the—well, 804 as the principal stockholder of the company. Unfortunately he is dead now.

Mr. Leisure: I have not had a chance to read it. We may have no objection to it.

Examiner Norwood: You may read it.

The Witness: It just deals with the curtailment at the time of the code. I wrote that letter at the time, I know I did.

(COM. EX. 85-A-B-C, 86-A-B-C and 87 were offered and received in evidence.)

805 Mr. Leisure: I am going to object to that exhibit. It is not complete, apparently, and it is a copy of a copy. I don't know whether the whole letter is there or not. I think it is incompetent, immaterial and irrelevant as it stands.

Examiner Norwood: It is admissible if the copy is, isn't it?

Mr. Wooden: It is admissible whether complete or not, your Honor.

Examiner Norwood: Under the best evidence rule, copies of copies are admissible.

Mr. Leisure: I don't know whether the whole letter is there or not, your Honor. It just stops, there is no conclusion, no "very truly yours" and no ending.

Examiner Norwood: Is there any objection to the contents? You can testify that that is a copy of the original letter?

The Witness: I wrote that to Mr. Paine at that times; I know that. It is about the code, isn't it, and about curtailment and the general conditions of the plant?

Examiner Norwood: Objection overruled. Exhibit 88-A and B are received in evidence and marked.

(COM. EX. 88-A and B was offered and received in evidence.)

806 The witness identified Com. Ex. 89 A and B as a letter dated April 9, 1935 from Lone Star of Indianapolis to the trade. It was part of his business to find out without losing too much energy what the other fellow was doing. The witness said this letter might have been picked up on the road and it might have been sent in by Fuelling and in that way it came into the witness' possession. It was a circular of wide distribution in the trade.

Examiner Norwood: You testified that you received this in the ordinary course of business?

807 The Witness: Otherwise I would not have had it. I don't know how I got it, I cannot tell you that.

Examiner Norwood: Objection overruled. Received as Commission's Exhibit 89-A and B.

(COM. EX. 89-A and B was offered and received in evidence.)

By Mr. Wooden:

Q. Now, I show you papers marked Commission's Exhibit 90 A and B. What are those papers?

808 Examiner Norwood: I should think in regard to 89-A and B you should show that they were a member of the Institute or under the domination of one of these respondents.

Mr. Wooden: I did not think there was any question about the relation of the Lone Star Company to the proceeding.

The Witness: No. 90-A dated May 22, 1935, is a plan of cement distribution gotten out to our trade, the Aetna Company's trade.

By Mr. Wooden:

Q. And what is No. 90-B?

A. 90-B is a marketing plan that I myself got out, and we sent it out to the trade.

Mr. Wooden: I offer them for the record.

Mr. Leisure: May I ask a question on this exhibit your Honor?

Examiner Norwood: Certainly.

Mr. Leeisure: On Commission's Exhibit 90-A, you say it was gotten out by your company?

The Witness: That is the first one?

Mr. Leisure: Yes. Who got that out?

The Witness: We had it printed, that is all; and I think that you will find that that plan probably is the same plan

put out by the International and some others. And
809 this 9-B is the plan that I put out previous to this publication. That was my own idea on distribution. I think that is a little bit different.

Mr. Leisure: You got out Commission's Exhibit 90-B before Commission's Exhibit 90-A was gotten out?

The Witness: That is correct.

Mr. Leisure: Subject to our motion, we have no objection.

(COM. EX. 90-A and B was offered and received in evidence.)

By Mr. Wooden:

Q. Is this writing in the upper left hand corner of 90-A and 90-B your handwriting?

A. I noticed that. That is my handwriting.

Q. One of them reads "their plan," and the other reads "our plan," does it not?

A. Yes.

Q. Whom did you mean by "their plan?"

A. It is the general plan that evidently came out at that time among the different cement companies in this midwest district, you might say.

Q. Was the paper or the announcement put out by the Aetna on which you wrote the words "their plan," is
810 that the same as the Lone Star circular of April 9, 1935?

A. Well, they both would have to be compared here.

Q. Do you have a recollection about it as to how you made them up and on what basis you made your circular up? Unless you can answer it without comparing them, you don't need to bother.

A. I think that our plan marked "their plan" would be this plan (indicating).

Q. In other words, the same as the Lone Star circular of—

A. (Interposing) April 9th.

Q. 89-A and B?

A. Yes.

Examiner Norwood: Did you get that out after you received the Lone Star circular?

The Witness: It was about a month later.

By Mr. Wooden:

Q. I wanted to ask you why there should be such a lapse of time before your getting up your circular and the

Lone Star getting out its circular, seeing that you adopted the Lone Star plan?

A. Well, we had come out, if I remember correctly, with this particular plan of mine.

Q. Referring to Exhibit 90-B?

A. Yes. But it did not become prevalent, and so we put out under that plan 90-A. That was during the
811 code time, I believe.

Q. Did your company, the Aetna Company, take any part in the appearance of members of the industry in opposition to the anti-basing point bill?

A. I don't recall that bill.

Q. That is the one that we were talking about a while ago which you referred to as the investigation in Washington.

A. Did we take any part in it?

Q. Yes.

A. In what manner?

Q. Any part?

A. Not that I am aware of, although I think—

Mr. Leisure: (Interposing) We don't want what the witness thinks. If he knows.

Examiner Norwood: Answer from your own knowledge on that.

The Witness: I cannot recall.

By Mr. Wooden:

Q. Did you fear the results of that proposed legislation on the business of the Aetna Company?

A. I do remember now and recollect that there was something of that nature, because I remember a letter—you probably have it—that was the result of a conference with my friend and attorney, Robert McKean, and I think he wrote that letter to Mr. Johnson, and if you have
812 got all this stuff, you no doubt have that. That might clear it up and give you your answer.

Q. Did you see in the proposed anti-basing point legislation, any disadvantage to the interests of the Aetna Company?

A. I cannot remember having seen it.

Q. Referring to the discussions that you had, and did you make some study of the situation as it would affect the Aetna Company if such legislation were passed?

A. I believe I did at that time.

Q. What was the result of your study of the subject?

814 The Witness: The result of that was, I believe at that time, that the Aetna Company would be pretty well protected against that type of legislation on account of the particular warehouse locations. I believe that was may thought in the matter.

By Mr. Wooden:

Q. In other words, the legislation would not have injured your company if passed?

A. I believe that was the impression, that we would be pretty well protected, and it would be another good thing—another good reason why the warehouses were an asset to the Aetna Company.

Q. Now, Mr. Cree, at the time of your discharge, did you know that Mr. Lingeman was also leaving the company?

A. I did.

Q. How did you know that?

A. I was told by Mr. Johnson at the time.

Q. Do you know whether or not Mr. Lingeman left voluntarily or involuntarily?

815 The Witness: I believe he resigned.

Examiner Norwood: Do you know?

The Witness: Yes, he resigned.

By Mr. Wooden:

Q. Will you state again, the exact date of your discharge?

A. I cannot remember the exact date. It was in July a year ago.

Q. July, 1936?

A. Yes.

Q. Have you made efforts since that time to make another connection in the cement industry?

A. I have.

Q. Will you state in a general way what you have done in order to make such connection or try to make such a connection?

A. Well, I have made some contacts endeavoring—

816 The Witness: By writing letters and telephone conversations and personal interviews.

By Mr. Wooden:

Q. With what result?

Mr. Leisure: Objected to, also, your Honor, for the same reason.

Examiner Norwood: Objection overruled.

The Witness: Well, the result was that I was not successful.

By Mr. Wooden:

Q. How many cement concerns did you solicit to employ you?

Mr. Leisure: The same objection, if the Court please.

Examiner Norwood: Same ruling.

The Witness: I cannot remember the distinct number. I wrote several letters, I know, and made several calls.

By Mr. Wooden:

Q. Did you go out into other sections of the country than the section you were familiar with?

A. Yes.

817 Q. Did you canvass your former competitors for a position?

A. I did.

Q. You have already stated the result. Did you get any information from any former competitors as to the reasons they would not consider your application for employment?

The Witness: I will say yes.

By Mr. Wooden:

Q. From whom?

A. Well, I received correspondence from the people I wrote to, and I received verbal conversations from those whom I talked to at the time I called.

Q. Can you name any that you talked to?

A. Well, I talked to the Peerless Company.

Q. What individual?

A. Well, I talked to Mr. Baker, the president, and 818 I talked to Mr. Russell, the manager.

Q. Will you state the substance of your conversation with those gentlemen?

Mr. Leisure: Can we specify so that we can follow which one?

Mr. Wooden: Yes.

By Mr. Wooden:

Q. Did you have separate conversations with them or both together?

A. I had separate conversations with them.

Q. All right; first tell us the substance of the conversation you had with Mr. Baker?

A. Well, I had three conversations with Bob Baker.

Q. All right; separate them and tell us what they were.

A. Well, those conversations took over a period of perhaps a couple of months, and I was rather waiting with anxiety thinking that perhaps I could get located with them, because I could do them a world of good. Finally, the thing was consummated in the expression from Mr. Baker that he did not think that it would be quite proper for me to go with them because I might take the Aetna Company's customers, or I might get their business, and so that remark brought from me that I thought it was their business to hold their business, and I told them I did not think that was quite the proper American spirit.

That is the truth, and you asked me and I told you.

819 Q. What did he say to that?

A. He, as a very fine gentleman, said, "I guess you are right, Harold." So I went away, and that was the last of that.

Q. Do I understand then that the Peerless Company did not want you because you might take some of the Aetna Company customers?

Mr. Leisure: That question has been answered.

Examiner Norwood: I would like him to recapitulate on that. I was not sure that the witness was clear on that. Read the question.

(The question was read.)

Examiner Norwood: Is that right?

The Witness: That is right.

By Mr. Wooden:

Q. Were you seeking any kind of a job with other cement companies or did you want a salesmanagership?

A. I would have taken any job that sells cement.

Q. Do you know whether or not your competitors recognized your selling ability?

Mr. Leisure: Now, that is incompetent, irrelevant and immaterial, and not binding.

Examiner Norwood: He can give any facts that he knows.

Mr. Leisure: It is purely calling for the conclusion

820 of this witness.

Examiner Norwood: As bearing on the proposition

of the motive. Objection overruled. You may answer. Read the question.

(The question was read by the reporter.)

Examiner Norwood: Answer that yes or no.

A. Yes.

By Mr. Wooden:

Q. Who was this other man with the Peerless Company that you referred to as having had conversations with?

A. That was Mr. Walter Russell.

Q. What was the substance of your conversation with him?

A. Well, on the same theory or thought.

Q. The same what?

A. The same theme song, that I might disturb the Aetna customers.

Mr. Leisure: I object to the substance of conversations. The witness should be asked what he said to the other party to the conversation and what the other party to the conversation said to him. In that way we can meet testimony, but we can not meet just theory or conclusions.

Mr. Wooden: That is what I would like to have, of course, as far as possible.

Examiner Norwood: Answer it as definitely as you 821 can.

A. Well, I thought the conversation with Mr. Baker was definite enough to express the thought there, and the conversation with Mr. Russell, and a very fine gentleman too, was along similar lines. They both realized that I controlled—that I had selling powers, they realized my selling ability. I was perhaps indiscreet, but I will say they did know I controlled a particularly nice tonnage in the State of Michigan, that kind of tonnage that not everybody can get, that kind of tonnage that one who has had for 15 years or more has become acclimated to, that it is rather productive, for anybody to steal it away from them. So they were aware of that, and I thought that certainly somebody would be knocking at my door to give me a job in selling cement. When I woke up I found out I was not so smart, evidently, so I started knocking at their doors and I found out those answers.

835 LUCILLE V. FOWLEY, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I have been living in Detroit for the last 17 years. At the present time I am living at my mother's home in Alpopas, a very small town in southern Illinois, taking care of my mother, Mrs. John Fowley, who is critically ill. I was employed by the Aetna Portland Cement Company in Detroit from June, 1930 to September 1, 1937. From the time I started until July 28, 1936; I was employed under the
836 general supervision of Mr. O. J. Lingeman and thereafter under Mr. Ben W. Calvin.

Q. What were the reasons for your leaving the employ of the Aetna Portland Cement Company?

A. Well, my home was in Detroit, and when Mr. Calvin told me that we were going to move the offices to Bay City, to the main plant, he asked me to go along and I told him that I would, so I made preparations to go and wound up all the interests that I had there, and really went to considerable expense, and then we went to Bay City on the 5th of June.

Q. This year?

A. This year. And immediately after we got up there, in fact on the Monday after the Saturday of moving up there, I could see a very complete change in Mr. Calvin towards me and towards you might say everybody in the employ of the company—

Mr. Leisure (interrupting): If the Court please, I want to object to this line of testimony as not being material or relevant to any of the issues in this proceeding.

Examiner Norwood: Objection overruled; until we get some idea about it.

By Mr. Wooden:

Q. Go ahead with the reasons that you left the employ of the company.

A. The reason I left was because I thought Mr.
837 Calvin began to get very indifferent toward me. When he came with the company, I was the only one left in the office who knew anything about the business so far as the office was concerned. Everybody else with the excep-

tion of one man—and I was the secretary—Mr. Calvin—after one year I think I had told him about everything that I knew, and then I think he felt—

Mr. Leisure (interrupting): If Your Honor please, I think this is not proper testimony in this proceeding.

Examiner Norwood: I think the counsel is going to connect this in some way. I am willing to trust him in regard to that.

Mr. Wooden: I have little control over what she may say in answer to my questions, but I am merely asking her for the reasons that she left the employ of the company.

The Witness: Well, his actions clearly indicated that he would just as soon that I would maybe give up my position—

Mr. Leisure (interrupting): Now, I submit that answers the question, if the Court please.

Examiner Norwood: I think it does.

By Mr. Wooden:

Q. Did you then resign?

A. I told him on the 11th of August that I wanted to quit, and he asked me to stay until the 1st of September 838 to help break in another girl, and I did.

Q. During the period that you were under Mr. Lingeman, what were your general duties?

A. Well, I was secertary to Mr. Lingeman; I took all of the dictation, in fact in the whole office, I wrote all of the letters that were written, I answered the telephone a great deal. We did not have a switchboard, and anyone answered the telephone that happened right not to be busy when it rang.

Q. And did you have anything to do with the filing?

A. All.

Q. You handled all the filing?

A. Entirely.

Q. From whom did you take dictation other than Mr. Lingeman, if anyone?

A. Mr. A. G. O'Neal, who was the auditor, and Mr. H. S. Cree, who was the salesmanager.

Q. Anyone else?

A. Oh, I occasionally took a letter for Mr. Smullen, one of the salesmen; only an occasional letter. I really wrote it myself and he signed it.

Q. Did you know Mr. Johnson, the president of the company?

A. Very well.

Q. Did he come out to Detroit occasionally?

A. Once or twice a year. I think the last year he
839 was out three times.

Q. When he was there, did you take of his dictation?

A. Yes, sir, all of it.

Q. Under Mr. Calvin, were your duties changed in any way?

A. No.

Q. The same general type as you have already described?

A. Yes, I think I had more work, but it was all about the same.

Q. Did you see the incoming and outgoing mail?

A. All of it.

Q. Do you mean that you opened the letters and read them?

A. I opened some of the mail. I read practically all of the mail that was on Mr. Lingeman's desk, answered a good bit of it myself, and filed it all.

Q. Was the sales force of the Aetna Company increased under Mr. Calvin's management?

A. Oh, materially.

Q. From what to what?

A. Oh, from three to ten salesmen.

Q. Did the volume of business likewise increase?

A. No, this last year it dropped off noticeably.

Q. Can you state how the volume of business under Mr. Calvin compared with that under Mr. Cree as salesmanager?

A. Well, of course, during the depression, things dropped off, as I suppose they did every place, but we
840 sold more cement—we sold as much cement the first year Mr. Calvin was there approximately as we did the year previous, but this past—well, I will say up until I left there August 31, it was dropping off all the time, each month it was dropping off.

Q. Do you know whether or not—

A. (Interrupting.) June was a good month, but it began dropping then back down from there.

Q. Were there any customers of Aetna that left the company during Mr. Calvin's regime?

A. Yes.

Q. Any among your customers that you can name?
A. One very important customer.
Q. Who was that?
A. Mr. Jerry Utley.
Q. Where was he?
A. In Detroit. He is a large contractor.
Q. Do you know why he left?
A. Yes.

Mr. Leisure: That is objected to if the Court please, as incompetent, immaterial and irrelevant.

Examiner Norwood: Objection overruled.

By Mr. Wooden:

Q. You say, yes, yuo know why. Why was it?

A. He left because Mr. Cree was a friend of his, 841 and he had given our company you might say about nine-tenths of his business, and he was the sole contractor for General Motors and Fisher Body, so that was a large business, and when Mr. Cree left, we got no more business from Mr. Utley, and he said the reason was he had given all of his business to the Aetna Company while Harold Cree was there and now that he got a dirty deal, he would buy his cement from somebody else.

Q. How large a customer was Utley?
A. Oh, I don't think I could say as to tonnage.
Q. Was he one of the larger customers of the company?
A. He was the biggest customer. I think he is the biggest customer in the State. Fisher Body jobs of course, and General Motors are all big jobs.
Q. Was there any difference in the pricing policy of the Aetna Company as you observed it under Mr. Cree and Mr. Lingeman, and Mr. Calvin?

Mr. Leisure: I object to that, if the Court pleases. He certainly can produce competent evidence if that kind of testimony is material in this case.

Examiner Norwood: Well, he can bring out the facts indicating the policies.

Mr. Leisure: A secretary is not a competent witness to pass upon pricing policies of a company.

Examiner Norwood: I am not so sure about that.

Mr. Wooden: She was more than a secretary, Your 842 Honor, of course. She knew all about the business and was considered an associate in the business, I should say, from her testimony.

Mr. Leisure: I object to the question.

Examiner Norwood: Objection overruled.

The Witness: Well, I don't know that there was—I don't know whether I just understand your question.

Examiner Norwood: Read it.

Mr. Wooden: If she does not understand it I will have to try again.

The Witness: I want to be sure just what you mean.

By Mr. Wooden:

Q. Was there any difference noticeable to you between the relations between the Aetna Company and its competitors under Mr. Lingeman and Mr. Cree, and under Mr. Calvin?

Mr. Leisure: Now, that question is obviously objectionable and calls for the conclusion of this witness. Surely these respondents are not going to be bound by the opinions of the secretary on matters that are questions at issue in this proceeding. At best the question calls for her conclusion.

Examiner Norwood: Read the question.

(The question is read.)

Examiner Norwood: I think that he can go directly to the differences. That is an approach to it. Objection 843 overruled.

The Witness: Well, the only difference that I would state—

Examiner Norwood (interrupting): Just a minute. Answer that yes or no.

The Witness: Well, yes, some.

By Mr. Wooden:

Q. All right. Explain your answer.

A. Well, Mr. Cree and Mr. Lingeman did not consult—

Mr. Leisure (interrupting): Now, I object to this type of answer, if the Court pleases. This witness is giving her conclusions.

Mr. Wooden: She is showing a definite knowledge.

Examiner Norwood: I think you had better let this witness tell it. I will entertain a motion to strike after she has given her answer.

The Witness: Mr. Lingeman and Mr. Cree did not consult other companies on prices to be quoted on jobs, like Mr. Calvin did.

Mr. Leisure: I move to have that answer stricken from the record. It was perfectly apparent that that was the kind of a conclusion that this witness was going to give. If she heard telephone conversations, if she was present when certain conversations took place when her new employer consulted other competitors, then we can meet
844 that kind of testimony, but we can not meet testimony where a secretary comes in and just gives a general statement of that kind.

Examiner Norwood: You are testifying from your own knowledge?

The Witness: Oh, absolutely.

Examiner Norwood: Objection overruled.

By Mr. Wooden:

Q. Would you describe any cases where you know from what you heard that Mr. Calvin did confer and consult with competitors on bids?

A. Yes. There were two sets of two bids at each time for small Government jobs, and that new bridge at Sarnia between Canada and the United States.

Q. When was this?

A. Well, they were both—before we moved to Bay City. In th spring.

Q. In the spring of 1937?

A. Yes, April or May.

Q. State just what occurred within your knowledge.

A. Well, on the bridge job, he talked to different companies about the price to bid on the cement, and on the Government job—

Mr. Leisure (interrupting): If the Court pleases, I move to strike the answer out. It may not be any of
845 the respondents that he talked to, and if so it is not binding in this case.

Mr. Wooden: You cannot get it all at once.

Examiner Norwood: Objection overruled.

By Mr. Wooden:

Q. Can you name any of the companies to whom he talked about those things?

A. Well, he always talked to Huron and Peerless; seldom to Wabash.

Q. Do you know what the bids were when they were filed?

A. I don't remember now; I don't remember what the bids were. I knew all about the business at the time. We wanted the business because we have a warehouse in Port Huron, and of course we wanted the business for our warehouse up there, but I believe Peerless got the job.

Q. Did you hear the telephone conversation?

A. Oh, yes.

Q. You know that he talked?

A. Oh, yes.

Q. Describe what was said as nearly as you can if you heard the telephone conversations?

A. Well, they merely talked about the prices that were to be bid on this job and talked with the contractor that came up, I believe from Chicago, the contractor who got the job, he talked with us, he happened to know our
846 warehouse man at Port Huron, and he would like for him to have had the job because he knew him. But it was a conversation on the price and talking about gravel and the aggregates hat go into concrete.

Q. State whether or not the prices that were to be bid were mentioned in the conversation?

Mr. Leisure: I object to this continually leading of the witness. The telephone conversation can be brought out, and if she remembers anything about it, she can testify it, but constantly suggesting answers to her is improper.

Examiner Norwood: I think that we can get right down to the subject just as well the way these questions are being asked now. Objection overruled.

The Witness: Well, I could not tell you what the bid was; I don't remember.

By Mr. Wooden:

Q. That was not my exact question. Will you read it please?

(The question is read.)

The Witness: Oh, yes, they talked prices, about what the price was to bid, "What are you going to bid?"

By Mr. Wooden:

Q. Did they inform each other what they were going to bid?

A. Yes. They always did. I heard Mr. Calvin ask
847 "Is such and such right?" And evidently the answer was "Yes"—it seemed to be that way.

Q. Can you name any of the concerns with whom you heard Mr. Calvin have such conversations?

A. Well, Huron and Peerless.

Q. Any others?

A. I don't remember any others. He seldom talked to Wabash. That is the only other cement company who had an office in Detroit.

Q. Were there any long distance telephones to concerns outside?

A. On that job, you mean?

Q. Any job.

A. Well, yes. They were always talking back and forth to Universal and different cement companies about prices on jobs, especially government jobs.

Q. Can you name any particular job on which such conversations were held?

A. Well, previous to Mr. Calvin, the Algoma job was discussed on the telephone, that is it was discussed by Universal. They called up and tried to tell us how to bid.

Q. Did you hear that?

A. Oh, yes. I did not listen in on the telephone, but I heard the man in our office tell the Universal man to attend to his own business, that he knew how to bid.

Q. Do you know who the Universal man was?

848 A. I don't remember his name. I would know it if I heard it.

Mr. Leisure: Could we get the date fixed of this last conversation?

By Mr. Wooden:

Q. Can you fix the date?

A. Oh, no, not unless you knew the date of the Algoma bid.

Q. As to the year, I mean.

Examiner Norwood: The approximate date.

The Witness: It has been two years and a half ago.

Examiner Norwood: We will have a five-minute recess.

(Whereupon, a short recess was taken after which the hearing resumed.)

By Mr. Wooden:

Q. Miss Fowley, were you in the offices of the Aetna Cement Company when Mr. Lingeman and Mr. Cree left the service of the company?

A. Yes.

Q. Do you know anything about the circumstances of Mr. Lingeman's separation?

A. Yes, sir, all about it.

Q. Did you ever discuss it with Mr. Lingeman?

849 A. Yes.

Q. Will you state the information that you received from Mr. Lingeman about his separation?

A. Well, Mr. Johnson drove out to Mr. Lingeman's summer home on Lake St. Clair and walked in and asked him to sign that paper resigning from the company.

Q. Did Mr. Lingeman tell you that he did sign it?

A. Yes, under pressure.

Q. It was not a voluntary resignation?

A. Oh, absolutely not.

Q. Did you ever discuss with Mr. Calvin the matter of Mr. Cree's efforts to get a connection with the cement industry after he left the service of the Aetna Company?

A. Yes, once.

Q. Will you state what was said?

Mr. Leisure: That is objected to, if the Court pleases, as incompetent, immaterial and irrelevant. The reasons for his not acquiring a new position—

Examiner Norwood: (Interposing) Objection overruled.

The Witness: I sat at his desk and we were talking about Mr. Cree. I said, "Mr. Calvin, I don't believe Mr. Cree ever will get back with a cement company do you?" And he turned around and looked at me and he laughed, and he said, "I know dam well he won't."

850 That is all that was said.

By Mr. Wooden:

Q. Under Mr. Calvin's direction during his regime, was there any change in the connection between Aetna and the Limestone Products Company?

A. Yes.

Q. What was that change?

A. Well, we had a contract with Mr. Smith of the Limestone Products Company, and Mr. Calvin asked Mr. Smith to give up a part of the territory in the Upper Peninsula, which he did.

Q. What became of the business in that territory? Did someone else get it?

A. Well, of course, the customers—when the business in the territory that Mr. Calvin asked to be given back to us—if we got the business, it simply meant that it was clear to us that a commission was not paid to Mr. Smith. We got it without paying the expense of warehousing and everything out there, and a certain amount of money that he was allowed for selling the cement. It cost us less money to sell direct in the Upper Peninsula than it did to have the job go through Mr. Smith.

Q. Do I understand you handled the filing of correspondence at Aetna?

A. All of it.

Q. Did you have any instructions as to what your
851 policy should be in the filing of such correspondence?

A. Oh, yes.

Q. What were your instructions?

A. Well, to be careful what I filed. Anything that might be damaging if a government investigator got into our files, I was not supposed to put anything in there, but once in a while something did slip through and get in there that I should not put in.

Mr. Leisure: May we have from whom this instructions came?

Mr. Wooden: I was just going to ask.

By Mr. Wooden:

Q. Who gave you those instructions?

A. Mr. Lingeman when he was there, and Mr. O'Neal, the auditor, and then when Mr. Calvin came, of course Mr. Calvin was vice president and general manager and all of my instructions came from him.

852 Q. Did you have pass through your hands, as the person in charge of the files, correspondence from competitors of the Aetna Company?

A. Yes, sir.

Q. What did you do with such correspondence?

A. Well, if it was anything that should not go in the files it was torn up and put in the wastebasket, but occasionally something got through. If I did the filing hurriedly once in a while something did get in that apparently should not have been in there, from what I heard afterwards.

Q. Explain your answer, from what you heard afterwards.

A. Well, after the last investigator was there, which was about in November, Mr. Calvin was in the Chicago meeting and Mr. Carmichael, I believe it was, came, and Mr. O'Neal talked to him.

Q. Who was Mr. Carmichael?

A. Mr. Carmichael, the Government investigator or attorney.

Q. What branch of the Government?

A. Federal Trade.

Q. Federal Trade Commission?

A. Yes.

Q. All right, go ahead with your statement.

A. He came in and I talked to him. He gave me his card. I told him Mr. Calvin was not in and I had instructions that I was to let no one talk to a Government
853 man when he was not there, and Mr. O'Neal had, previous to Mr. Calvin's coming to the office, had so much authority that he could not get over the fact that he still did not have authority, so he came up and talked to the man.

Q. To Mr. Carmichael?

A. Yes, to Mr. Carmichael. So I called Mr. O'Neal aside and I told him my advice to him was not to talk to Mr. Carmichael but let him come back when Mr. Calvin was there, let him talk to him, so I took him to Mr. Calvin's office.

Q. Mr. Calvin was not there?

A. Mr. Calvin was not there. He talked to Mr. Carmichael in Mr. Calvin's office.

Q. Was anything said on that occasion about the examination of files by Mr. Carmichael?

A. Oh, yes, he asked—of course I was not in the room, I could hear what they were talking about, I knew what they were talking about, I was listening, and he was asking about correspondence, he was asking about the Cement Institute and Portland Cement Association, and Mr. Cree—or Mr. O'Neal would call in and ask me to bring a file, or if there was anything about such and such a thing in a file, and if he would ask for the Cement Institute file I took it to him, and if he asked for another one I took it to him. I think there were about two. So I found out what he was doing, so I got up and got the files. I got look-
854 ing in one that I thought might have something that he should not see and I took out three or four letters,

out of the files and I threw them in the wastebasket, and then he asked for those files that were all right for him to see. Then when Mr. Calvin came back I went in and told him then what had happened, and he said, "Bring me those files," "bring me a certain file," I do not remember which one it was. I took it in to him, and I had even overlooked something and he began tearing out a letter or so and throwing them in the wastebasket. He gave me a dirty look and told me those had no business being in there, so I took those that he thought should be out of there and they were put in the wastebasket.

Q. Do you remember any of the papers that you took out of the files on that occasion?

A. Well no, I do not remember what was in there. They were from different cement companies.

Q. Well, do you remember the names of any competitors with Aetna Company whose communications you took out of your files?

A. No, I do not remember which ones I took out, but I know whom they would have been from, one or two or three.

Q. Well, answer that.

A. Wabash—

Mr. Leisure: I object to that, whom they would have been from. That is not competent evidence.

855 Examiner Norwood: What do you mean by "would have been from"?

Mr. Leisure: Whom were they from. She has already said she did not know whom they were from.

Examiner Norwood: Whom they would have been from if they had ever been received, or what?

The Witness: No. For instance, we had so little correspondence from our competitors to be kept that I kept no file for any cement company, but if there was a letter that came in from Wabash I filed it in the "W" file, and if there was one from Peerless I put it under that code, but there was so little of it that it was not worth while to keep a file on any cement company, because the majority of the correspondence that came in was memorandums with no signatures nor dates and I could not have told who it was from if the card was not attached to it.

By Mr. Wooden:

Q. Now I am interested in that. Did you receive memoranda in the mail from time to time, unsigned memoranda?

A. Oh, yes.
Q. Were they addressed to the Aetna Company?
A. No, sir.
Q. You mean just a plain sheet of paper?
A. Just on a little narrow piece of paper like that
856 (indicating).
Q. How were they received by the Aetna Company in the mail?
A. In plain envelopes.
Q. Whom can you name that sent in such communications, and how do you know that they were the senders?
A. Well, how we could tell who the sender was, there would be a card of the man who sent this correspondence, his card would be clipped to this little clipping, you might say. That it how we would know who it was from.
Q. And what did you do with such communications?
A. Oh, it was thrown away, read and thrown away.
Q. How about the card?
A. Thrown away.
Q. Who read them?
A. Usually everybody in the office.
Q. You yourself?
A. Oh, yes.
Q. How long did that practice go on?
A. Well, all the time I was with the cement company, we used to get them. We got them only occasionally, if something came up between the companies that I suppose they wanted to talk about, without their names signed to it. It was not an everyday occurrence.
Q. Did Aetna then send out any communications like that without a name being attached?
857 A. I remember only once.
Q. Would you give the instance?
A. Myself I remember only once.
Q. Can you describe that?
A. I do not know what it was about, but I do know who sent it out. It was Mr. O'Neal, because I attached his card to the memorandum and he instructed me implicitly to put it in a plain envelope, and it was sent to Medusa.
Q. Can you fix the approximate time?
A. No, I can not.
Q. Do you remember anything about what it related to?

A. No, I do not.

Examiner Norwood: These unsigned memoranda, were they all about on the same subject? What were they about?

The Witness: Well, they would be about bidding on some job. It would be in reference to some letting that was coming up.

By Mr. Wooden:

Q. I understood you to say you took dictation from Mr. Johnson when he was in Detroit.

A. Oh, yes, sir.

Q. Did you have any instructions as to the handling of the filing of Mr. Johnson's communications?

A. Well, I kept all of his correspondence in a
858 folder under his name. I had two folders a year, from January to June and from June to December, and when Mr. Lingeman was with us all the correspondence to and from Mr. Johnson was kept in his desk, locked.

Q. Did you make it a policy to file all carbon copies of outgoing letters?

A. No, sir.

Q. What was your policy?

A. Well, if there was something we did not want to keep a record of a copy was not made.

Q. Did you get special instructions as to that each time or did you have your own discretion to follow?

A. No, each time. Oh, occasionally I would run into something. I knew what I should make a copy of and what I should not. I had been there long enough to know that.

Q. What did you know you should make copies of and what did you know you should not make copies of?

A. Well, when they were talking about controversies between different companies, and when there were discussions and debates as to trucking, and as to warehouses, and pricing, trucking rates, and then when we would have—we would write things to Mr. Johnson that we did not want a copy made of, I would just make one copy. After Mr. Calyin came with us I made a copy and an original and the original went to Mr. Johnson and the copy to Mr. Bolster.

859 Q. Who was Mr. Bolster?

A. Mr. Bolster was secretary of the company since Mr. Paines left.

Q. Did you have any general policy as to the filing of original letters from Mr. Johnson?

A. Well, they were all filed in Mr. Johnson's folder, and, as I said, when Mr. Lingeman was with us they were filed in his desk, but after Mr. Calvin came the Johnson mail was all filed in my office.

Q. Was there any of the Johnson correspondence addressed to the Detroit office that was not filed?

A. Well, all that was given to me to file was filed.

Q. Do you know whether or not any arrived that was not filed?

A. Oh, yes.

Q. Will you amplify your answer on that?

A. Well, I know there were letters torn up and put in the wastebasket, because I had seen them, and I had seen them torn up.

Q. Letters from Mr. Johnson?

A. Yes. They usually had "Please destroy" written in ink; and likewise Mr. Calvin would write "Please destroy" on his letters to Mr. Bolster and Mr. Johnson, that is the letters that were written as memos, no date.

Q. Did you have occasion to ascertain or learn in any way what Mr. Johnson's policy or practice was with regard to his files?

A. Well, I have read in letters that he has written where he has said that he was going through his files and he was throwing out everything that might interest the government, and would tell us to do likewise.

Q. Do you know from your contacts there, and your knowledge of the business, what matters he had reference to when he said "Matters that might interest the Government"?

A. Well, prices and—

Mr. Leisure (interrupting): Now, if Your Honor please, I object to that question. I do not see how this witness can know what the operations of Mr. Johnson's mind are. She can guess, but that is not competent testimony.

Mr. Wooden: She was carrying out his instructions and had to understand what he meant.

Examiner Norwood: Read the question.

(The question was read by the reporter.)

Examiner Norwood: I feel sure the witness can testify as to what she knows. She is the only person who can testify to that. Objection overruled.

A. Yes, it was about prices, base prices, if we were trying to raise a price, trucking, especially trucking conditions in the Upper Peninsula when we had that controversy.

861 By Mr. Wooden:

Q. You mentioned base prices. What do you mean by "base prices"?

A. Well, the prices by which we gauge the price of cement to the different customers in the different towns.

Q. Did you figure your prices on the basis of certain basing points?

A. Yes, sir.

Q. What basing points did you use?

A. Oh, I believe on the list there were about ten or twelve.

Q. Did the list you referred to carry the prices applicable to these various basing points?

A. To the basing points, yes, the price at such and such a place is so and so, and all around that area the price was gauged from that basing point. For instance, Buffington, or Milwaukee, or Bay City, or Saginaw, Cleveland or Muskegon.

Q. What list was it that you were referring to, the list of basing points?

A. Well, we all had a list.

Q. Where did you get it?

A. It always came from somebody else.

Q. Well, can you say where it came from?

A. Some cement company. I do not know which one. They talked of different ones. When we were in doubt about a price we would call up Huron, or somebody
862 over at Peerless, and ask if we had the right price on it. Somebody else made the base. Huron set the price in Michigan.

Q. Was that the practice under the regime of Mr. Lingeman?

A. Yes, sir.

Q. And Mr. Cree?

A. Yes, sir. We went by base price.

Q. Did this list of base prices, did that come in a plain envelope?

A. No, they were usually talked over the telephone, then I would type up a list. Sometimes there would be a little change in the base price and then I would make up

a new list, and the man who used that list mostly—I was always instructed to look out for that list when the Government man was in the office.

Q. Name as many of the basing points that appeared on such lists as you can.

A. Well, there is Cleveland, Buffington, Milwaukee, Muskegon, Duluth, Bay City, Saginaw, and that town down in New York where Huron has a plant, I can not remember the name of the town.

Q. Was it Oswego?

A. Yes, I think that was it, where Huron has a plant. I do not believe I can think of any other right now. Muskegon was one of the latest base prices that was instituted.

Q. Did you have any instructions as to your be-
863 havior in the event any Government representative wanted to talk to you about such matters?

A. I was to say nothing.

Q. From whom did you get such instructions?

A. From my employer, Mr. Lingeman or Mr. Calvin, as the case might be.

Q. Did you ever get such instructions from Mr. Cree?

A. No, Mr. Cree never had very much to say about it. Mr. Cree never gave me any instructions.

Q. Do you know any of the circumstances under which Mr. Cree received the papers that have been used in evidence here today and yesterday?

A. Well, it was correspondence that he had in his desk, and everything was taken out to his home when he was—after leaving the company. He did not take it, he did not take it home.

Q. Was it sent out to him?

A. It was taken out to him.

Q. By whom?

A. By Frank Jenny.

Q. Who was he?

A. He was a clerk in the office, Mr. Lingeman's nephew.

Q. You told us about having to put on an additional number of salesmen after Mr. Cree's departure. What made it necessary?

864 A. Well, it was not necessary.

Q. Well—

A. Especially at that time, because it was at the end of the season when they began putting on new salesmen, but Mr. Calvin wanted to build up the prestige of the

company and make it look like he was doing big things, I guess, after it got under new management. We took on three new salesmen immediately and then one or two or three since then.

Q. Did you learn of any plan or any attempt being made to get in touch with Mr. Cree while you were there with Mr. Calvin?

A. Any plan being made to get in touch with Mr. Cree?

Q. Yes. I will amplify the question, with regard to whether or not he had supplied any information.

A. Oh, yes.

Q. To the Commission.

A. Yes.

Q. Will you state what you learned?

Mr. Leisure: I object to that, if the Court please. That is not relevant to any of the charges in the complaint.

Examiner Norwood: Objection overruled.

A. Well, Mr. Kean, Bob McKean, who was our attorney, and he is of the firm of Buckley, Leydord, Dickinson & Wright, Mr. McKean was a friend of Mr. Cree's,
865 and Mr. Calvin wanted Mr. McKean to find out just what Mr. Cree had told the Federal investigator.

Q. You say "he wanted". Don't give your conclusions but state what you know happened.

A. Well, the day that I left the company a letter came through from Mr. McKean to Mr. Calvin asking for permission from Mr. Johnson to contact Harold Cree, to find out from him if possible just what he had told the Federal investigators.

867 Q. What did you do upon learning of that matter?

A. I wrote Harold a letter and told him not to tell Bob McKean anything.

Q. Did you hear any conversation among the officials of your company, if you remember, with regard to the matter of the Indiana Farm Bureau sales or purchases?

A. Oh, yes, I heard all the talk, I guess, all that was said, I wrote all the letters.

Q. Will you state what you heard, who was present and what was said?

868 A. Well, do you mean in regard to our giving up the Farm Bureau business?

Q. Yes.

A. Well, we were being pushed quite forcefully by the cement company down in Indiana, Mr. Hogan's plant, the Lone Star plant, to give up that business in Indiana, particularly—

Mr. Wooden: I asked her to state who was present, what was said.

A. It was right at the time of the Portland Cement Association in 1936, it was about six weeks before Mr. Cree and Mr. Lingeman were let out of the company, I could not tell you the exact date. Mr. Pearson came here and spent a morning in our office telling Harold what he had to do about giving up the Farm Bureau business. Mr. Hogan told Mr. Johnson—

Mr. Leisure (interrupting): Now I object to what Mr. Hogan told Mr. Johnson.

By Mr. Wooden:

Q. Did you hear Mr. Hogan tell Mr. Johnson anything?

869 A. No, I did not.

Q. What is the basis for your statement that he told him anything?

A. A Lone Star salesman told our salesman, Mr. Fuelling, that Mr. Johnson—that Mr. Johnson and Mr. Hogan were close friends.

Mr. Wooden: That is a little remote.

Examiner Norwood: The motion is allowed to strike that.

Mr. Leisure: That last was on the assumption that even counsel thinks it too remote.

Mr. Wooden: All right, we will pass that over.

The witness identified Com. Ex. 22 A as a copy that she made of a memoradum written by Mr. Johnson
870 and sent to the Detroit office; Com. Ex. 22 B as a copy of some dictation she had taken in regard to a meeting. She was not sure just who dictated that memorandum although the dictation appears to be Mr. Cree's manner of wording; the "other one" as a copy she made of a copy of a letter dictated by Mr. Lingeman and written to Mr. Johnson. The original was mailed to Mr. Johnson. Mr. Lingeman would often tell the witness to make a copy of "so-and-so" and put it on Mr. Cree's desk. This was a copy that she put on Mr. Cree's desk.

871 Mr. Wooden: I offer those papers for the record now, Your Honor. They were offered yesterday and rejected for lack of sufficient identification.

Mr. Leisure: May I just ask a question, Your Honor?
Examiner Norwood: Yes.

By Mr. Leisure:

Q. On this Exhibit 22-C, do you recall this specific letter? Do you remember Mr. Lingeman dictating it?
A. Yes.
Q. And he dictated it to you?
A. Yes, sir.
Q. And you sent the original?
A. Mailed the original to Mr. Johnson. These are my initials on the bottom of the letter (indicating).

Mr. Leisure: As to that exhibit we have no objection, Your Honor, subject to our motion.

Examiner Norwood: Is that with respect now to Exhibit 22-A?

Mr. Leisure: 22-C. As to 22-A and B we still object as we did when it was excluded before. This witness could not possibly know what Mr. Johnson did when he was in Boston.

The Witness: Well, he wrote that letter.

By Mr. Leisure:

872 Q. This is not a letter.

A. That memorandum. He wrote and sent it to us, and called us up and talked to us on the telephone about it. Before we got it in the mail we knew it was coming. Mr. Lingeman waited a second day before he talked to Mr. Rooney, and then he called Mr.—

Q. (Interrupting): Are you familiar with the memorandum?
A. Absolutely.
Q. Do you know that Mr. Johnson talked about it?
A. Absolutely.
Q. Did he talk to you about it?
A. No, he did not.
Q. Whom did he talk to about it?
A. He talked to Mr. Lingeman.
Q. Were you present?
A. Yes, I was always right there. I know all about this. He put it off. Mr. Lingeman did not want to talk to Rooney, but he had to because Mr. Johnson told him to. He felt like it was putting him in the position of a child obeying his parents, but he finally, on the second day, called on Mr. Rooney and talked to him, and then

after he came back from Mr. Rooney's office, which was about noon, he called Mr. Johnson and told him to talk to Mr. Rooney.

Q. Well, this is the memorandum that Mr. Johnson forwarded after the telephone conversation, is that right?

873 A. Say that again.

This is the memorandum thst Mr. Johnson forwarded after the telephone conversation, this is the memorandum that you received?

A. This is a copy of the the memorandum that we got from Mr. Johnson telling Mr. Lingeman to go back to Mr. Rooney and told him just what to say.

Q. And you got this letter somtime later from Mr. Johnson?

A. It came in the mail from Mr. Johnson. This is a copy of the memorandum in the mail.

Q. What is the second one?

A. That is a memorandum made of what went on at a meeting, and it was dictated to me and I wrote it. That is one of the copies.

Mr. Leisure: As to the Exhibit 22-B, your Honor, we still object to that on the ground th at the witness had already said that she would not be certain who wrote it. It does not seem to me that is sufficient identification on that.

The Witness: I said it was not here, but on Mr. Cree's dictation I wrote the letter.

Mr. Wooden: The memorandum?

The Witness: The memorandum; I wrote it.

874 Examiner Norwood: Do you know who dictated it?

The Witness: I am not sure, but it appears to be Mr. Cree's dictation.

Examiner Norwood: In the former testimony, Mr. Cree identified that as his, didn't he?

Mr. Wooden: I am not really sure, but I did have the impression that at least one of the three papers was identified by Mr. Cree, and I thought the others also sufficiently to be received in evidence, but your Honor ruled otherwise.

Examiner Norwood: What is that?

Mr. Wooden: I said, I thought they were sufficinetly identified by Mr. Cree to be received in evidence, but your Honor thought otherwise and ruled them out.

(COM. EX. 22-A, B, and C was offered and received in evidence.)

Mr. Wooden: I should like to read for the record your Honor, at least a portion of this Exhibit 22-A. It is a memorandum dated October 28, 1933:

"Referring to the meeting at Book-Cadillac Hotel, October 24, of which you have a copy, and also to your letter of October 26 with the notes of the meeting—all on the
875 the question of trucking—I have gone over all of this and I appreciate thoroughtly what you have said: and after many times reading and careful thought last night at my home, undisturbed, and again this morning; I have come to the following conclusion:

"That it would be advisable for you, Mr. Lingeman, to notify Mr. Rooney, Vice President of the Huron Portland Cement Company, that the Aetna Company will cooperate with him and others in the new trucking plan—the same should commence November 1st, but we put in this reservation:

"That if we find at Grand Haven, Green Bay or Menominee it works to our disadvantage, and we are definitely sure we will lose business or are losing business by charging 5¢ a barrel more, where cement is delivered by truck than by railroad, then we shall adopt our old policy, which we think today is correct, namely, of equalizing rail and trucking rates.

"We are willing to give this a three-months' trial. We are doing this to show our disposition and desire to work with the Huron Company and others.

"We shall endeavor to sell the idea of service which we can offer by our trucks and get the 5¢ a barrel more; but if we cannot and we lose business, we will go back to the equalization rate plan.

876 "We still feel that the plan offered by F. R. J. at the meeting October 24 was feasible and workable, but we realize that there were some difficulties as to saying when the 10¢ additional should be charged.

"We will also eliminate distributors, and either sell our cement direct or through dealers.

"When going into Wisconsin, would suggest that you work in accordance with the Petoskey cement sales plan, which seems to me to be good.

"See also, Huron's letter to the trade, dated March 10, 1933.

"Say to Mr. Rooney: "If we should decide to discontinue the plan which we have approved of and say now we will work with, we will give you notice that we are going to discontinue.' Please make this clear."

Exhibit 22-C, Mr. Lingeman's letter to Mr. Johnson, November 1, 1933:

"Mr. Rooney of the Huron phoned this morning and made an appointment for the discussion of your proposal—that is, the five cent differential. I informed him that I talked to you yesterday on the three months as against the six months and stated that you again informed me that the terms of this proposal was to be three months. I also volunteered the information that you were writing Mr. Stroh a nice letter and this pleased him very
877 much."

By Mr. Wooden:

Q. Miss Fowley, do you know who Mr. Stroh was?

A. He is president of the Wabash Company.

Mr. Wooden: (Continuing) "He stated that Mr. J. B. Johns had asked him to attend a meeting down in Cincinnati tomorrow. The reason for Mr. Rooney's going is that Mr. Jennings of the Wabash is going to be there and they thought it would be an opportunte time to talk to him and they thought they had a good right to approach him on account of your proposal, showing your willingness to bring things to a head.

"Mr. Rooney also talked about a letting in Lansing Friday and then we discussed your proposal in a general way and he wants to draft up something with certain ideas which he has in mind and we told him that this would be entirely in accordance with our views and your views, and then when he has it ready we will arrange to have some kind of a meeting and discuss it."

By Mr. Wooden:

Q. I am now showing you, Miss Fowley, Exhibit 35-A, B, and C. Will you state what you know about those papers?

A. Well, those are my typed notes of a telephone conversation that I listened in on and took dictation from both sides.

878 Q. How did you come to listen in on the conversation?

A. Mr. Cree asked me to.

Q. Did you turn over the notes after writing them up?

A. I typed them the next morning and gave them to him.

Q. To Mr. Cree?

A. I showed them to Mr. Lingeman and gave them to Mr. Cree.

Q. This exhibit is already in evidence and was read yesterday, but there are some portions which contain comments of your own rather than the conversations between the two men on the telephone. There is one extract here where Mr. Cree asked Mr. Conkrite what Mr. Johnson said Aetna would do, and the exhibit reports Mr. Conkrite saying, "Read your memo" and then in parenthesis "very angry." Are the words "very angry" your interpolation?

A. No, that was Mr. Conkrite's attitude when he said that. He was very angry and I just put that in there because he was angry.

Q. You could tell he was angry?

A. Oh, certainly he was. Very.

Q. Mr. Conkrite said according to this, "Read your memo. It says you will give up trucking in the Upper Peninsula, and that if something cannot be worked out satisfactorily in regard to our distributor Mr. Smith, that Aetna will have to go along without him. You have the memo. What does it say about trucking in the Upper
879 Peninsula?" Will you say that that is a correct transcript of the conversation that you heard?

A. Yes. I think as I look at it here, that I have two or three dashes where I lost out on a few words, and I have indicated it there with dashes.

Q. There has been some pencil writing on the last page and then erased. Can you tell us anything about that? Whose writing it was or can you read it?

A. Well, that is Mr. Cree's writing erased, and I see my name there erased. There is just one or two words. I can read "at office."

Q. All right, I do not think it is important.

A. I can see my name there and I can see the two words "at office."

Q. Miss Fowley, can you say whether or not the Aetna Company under Mr. Lingeman and Mr. Cree pursued a

more or less independent price policy than they did under Mr. Calvin?

Mr. Leisure: That is objected to, if the Court pleases, as calling for the conclusion of the witness, incompetent, immaterial and irrelevant.

Examiner Norwood: Objection overruled.

The Witness: Well, I would say that there was a more independent atmosphere about the way the business was conducted, because Mr. Cree was independent and he took care of the business, he handled the business like he
880 thought it should be and he was not one to ask anybody else what he should do, because he knew as much about what should be done as anybody else did, and he did not ask any questions, but Mr. Calvin consulted somebody about everything that he does, practically.

By Mr. Wooden:

Q. And I believe that you have already testified that he consulted with his competitors rather freely?

A. Oh, yes. Apparently nothing comes up that he decides of his own, without talking to someone about it.

Q. Were your salesmen supplied with price lists?

A. Well, up to the time Huron came out last January with a flat price list in Michigan.

Q. What do you mean by a flat price in Michigan?

A. They came out with one price all over the State.

Q. Sometimes known in the trade as a zone price?

A. Well, I don't know whether they call it that or not, but last January—it was the first week in January—Huron came out with a flat price, the same price all over the State. The difference in the price is brought about by trucking rates.

Q. You say all over the State including the Upper Peninsula?

A. Well, I don't know whether it is including the Upper Peninsula or not. I don't remember.

881 Q. Did you say that was last January?

A. It was about the first week in January. We tried to raise the price.

Q. Who is "we?"

A. The Aetna Cement Company tried to raise the price 20 cents, and Mr. Rooney said he would go along 20 cents.

Q. Mr. Rooney of what company?

A. Huron.

Q. Said it to whom?

A. Told Mr. Calvin that he would go along at 20 cents.

Q. How do you know he told Mr. Calvin that?

A. Well, Mr. Calvin said he did, and it was all—we talked it over in our office. We were trying to get the price up. The price of cement was low. Then while we were talking of 20 cents, Mr. Rooney finally decided that he would only go 15 cents, so we made out our quotations at 15 cents, to raise the price. We talked to Wabash.

Q. When you say "we talked to Wabash," whom do you mean?

A. The Aetna Cement Company talked to the Wabash Portland Cement Company.

Q. What individual talked to Wabash?

A. Mr. Calvin would talk to Mr. Jennings.

Q. Did you hear him talk?

A. No.

Q. How do you know he did?

882 A. Well, that was the talk in the office. He said he talked to Mr. Jennings. I know that they talked back and forth on the phone, but I could not tell you now what the conversation was.

Q. All right.

A. And finally we made out the quotations and had them practically completed when Mr. Rooney of the Huron called up and said all he would go was a dime. So then we had to tear up the quotations and make them all over and send them out—that was the last week in December. We sent them out, and Universal and Medusa and Petoskey and Peerless and Marquette, they all went along a dime. They raised the price a dime. But Wabash came out with their quotation on the same price, so that meant the price was cut 10 cents again, and then we all had to send out more quotations and bring the price down to what it was in the first place. Then the first week in January, Huron came out with a flat price and took the base price off for Michigan. I cannot remember if it was the Upper Peninsula also, but it was Michigan.

Q. You said "We talked it over." Who do you mean by "we?"

A. Our company, the Aetna Portland Cement Company.

Q. Were you in the discussions on such matters?

A. Well, I always heard all the talk that was going on, yes.

Q. Did you participate in the discussion?

883 A. Well, I never talked business to any other men in the cement industry, but I knew quite a bit about the business and I talked with my employer, quite a bit about it and he talked to me. He knew that I had been there a lot longer than he had, and we talked it over generally. I was included in the conversations with him on business matters.

Mr. Wooden: Nothing further, your Honor. You may take the witness.

884 Washington, D. C.,
Tuesday, December 14, 1937.

886 Mr. Leisure: It is not Mr. Clark's appearance that I am withdrawing, it is our appearance that we are withdrawing. We are now withdrawing our appearanc on behalf of Mr. Clark's clients.

887 LUCILLE V. FOWLEY thereupon resumed the witness stand as a witness on behalf of the Commission, and testified further as follows:

Direct Examination by Mr. Wooden (Continued).

Q. Miss Fowley, have you read the transcript of the testimony which you gave in this proceeding on last Friday?

A. Yes, I have.

Q. Are there any errors or mistakes to which you want to call attention or corrections to be made?

A. Yes, I believe there are three that I marked.

Q. Will you indicate what they are in the transcript and state what the corrections are?

A. Well, the name of the town is incorrectly spelled.

Q. Your place of residence?

A. Yes.

Q. What should it be?

A. It should be Alto Pass.

Q. That is on page what?

A. 835.

Q. What other corrections have you to make?

A. The name of the auditor should be A. E. instead of A. G.

888 Q. O'Neal?
A. O'Neal.
Q. On what page is that?
A. 835.
Q. Are other corrections?
A. And on page 853, line 9, the pronoun is wrong. It should be "he" instead of "I".
Q. Is that the only pronoun in the paragraph, so there will be no mistake?
A. No, that is all.
Mr. Leisure: May I have that statement, please?
The Witness: On line 9, page 853, the sentence reads "Let him talk to him, so I took him to Mr. Calvin's office." It should be "so he took him."

By Mr. Wooden:

Q. Now, Miss Fowley, would you enlarge a little bit on the scope and nature of the duties that you performed while secretary to Mr. Lingeman and to Mr. Calvin?
A. Well, I did the work for all the men in there, particularly the vice-president and general manager. He came first, of course, always. The last three years of Mr. Lingeman's term with the company I wrote practically all of his letters and he signed them.
Q. You mean that you prepared them or just took the dictation?
889 A. I prepared a good many of them, and any number of them he would dictate the letters and I would tell him what he should say and what he should not say, or what he should leave out or he would get in trouble if he would say that, or he said,—whatever it was he was writing about, he would tell me to go ahead and fix it up like it should be. He never dictated a letter before I left his desk that he did not tell me to—he would ask me if it was all right and I would say whether I thought it was or not, and he said if there were any changes I wanted to make to go ahead and make them. Oftentimes he would start to write a letter and he would just throw up his hands like that (illustrating) and he would say, "You go ahead and write it, you know as much about it as I do."
Q. Were there times when Mr. Lingeman, Mr. Cree and later Mr. Calvin were away from the office?
A. Oh, yes.

Q. What was the nature of your duties while they were away?

A. Well, I never answered any letters or took care of any correspondence while they were gone unless it would be to write and tell someone that they were out of the city and that their correspondence would be taken care of on their return. But I never took anything—any authority of my own, I never answered anything without someone else's authority.

Q. Did you handle any matters over the telephone
890 during their absence, or carry out any of their instructions, or anything of that sort?

A. Well, I took orders over the telephone, I took messages and I maybe delivered a message if I had been left one.

Q. As I understand it you did not exercise the functions of those gentlemen while they were away?

A. No, no, I did nothing while anybody else was not there.

Mr. Wooden: That is all.

The Witness: But Mr. Calvin never told me those things. That was Mr. Lingeman that turned over the correspondence to me.

Mr. Wooden: That is all.

Examiner Norwood: Cross-examine.

Cross-Examination by Mr. Leisure.

Q. In other words, Miss Fowley, you followed the usual practices of a secretary, when your employer was away if some message came in by letter you wrote a letter back saying that Mr. Lingeman, or Mr.—

A. Calvin.

Q. —Calvin, or whomever the letter was addressed to, you simply called attention to the fact that this person was away, and it would be given attention when he got back, or something like that?

A. That is correct.

891 Q. Is that correct?

A. That is correct.

Q. Now I notice that on page 837 of the record—starting, Mr. Wooden, on page 836 at the bottom of the page—you were asked the question:

"Question. Go ahead with the reasons that you left the employ of the company.

"Answer. The reason I left was because I thought Mr. Calvin began to get very indifferent toward me. When he came with the company, I was the only one left in the office who knew anything about the business so far as the office was concerned. Everybody else with the exception of one"—

Q. Who was that one man?

A. Well, that was this young chap, Mr. Jenning, Frank Jenny, who was Mr. Lingeman's nephew. That appears right beyond what you read.

Q. And who else was there beside Mr. Jenny?

A. I think that was all.

Q. Beside Mr. Jenny?

A. Yes.

Q. Who was there beside Mr. Jenny at the time Mr. Cree left?

A. Mr. O'Neal.

Q. Mr. O'Neal. And he was there for some time?

A. Yes, sir, six months.

892 Q. Then Mr. Jenny was the only one that was left?

A. Yes. But as I—

Q. Go right ahead. As you what?

A. As I was going to say, I believe I did infer Mr. O'Neal was not taken into the confidence of Mr. Calvin. He asked him very little, or told him very little. Mr. O'Neal was just there.

Q. He was the auditor, is that so?

A. He was the auditor, yes.

Q. I observe also that on page 844 of the record you state that Mr. Calvin talked to competitors on the telephone, and that is in response to a question which reads as follows:

"Question. Would you describe any cases where you know, from what you heard, that Mr. Calvin did confer and consult with competitors on bids?

"Answer: Yes. There were two bids at each time for small Government jobs, and that new bridge at Sarnia between Canada and the United States."

Now taking up, first, the bridge between Canada and the United States. Who was Mr. Calvin talking to when he carried on that conversation, if you know?

A. Well, he talked to the contractor, he talked to Mr. Rooney.

Q. How what did you hear him say with respect to those bids?

A. I could not tell you in exact words. It was in
893 regard to the bidding on the job.

Q. And it was in regard to finding the price so that he could submit an identical bid, I suppose, finding the exact price that they were going to bid, is that so? Is that part of the conversation?

A. I could not tell you what the exact words now were.

Q. Well, if you can not remember anything about the conversation, what is there about it that causes you to remember it at this time?

A. Well, I know that he talked to Mr. Rooney about the bridge job.

Q. Now won't you just go further and tell His Honor what it was that he talked to him about? That is important, you know.

A. About the price.

Q. That is what I said. About the amount that was to be bid, is that correct?

A. Well, I said the "price."

Q. Well, it had to do with bidding, did it not?

A. Absolutely.

Q. Now will you go further and tell us whether or not he got the information that he sought, from what you heard of the conversation?

A. Why, yes.

Q. He did. Then did he follow it on his bid? Did
894 he submit the identical price?

A. I do not know what the bid was. I do not remember.

Q. But you do recall that he got the price on the bid?

A. He consulted Mr. Rooney. They talked about the price of cement on the bridge job.

Q. And don't you know whether or not he submitted the price that he got from these gentlemen, as to whether he submitted the identical price?

A. No, sir, I do not.

Q. Well, have you told us all you remember about that conversation?

A. Yes, sir. I know that we did not get the job.

Q. Well, I wish you would tell us more about the conversation, if you can remember it.

A. Well, I just told you that I had told you all I knew about it.

Q. But you are positive it was this job?

A. I am just as sure as I am sitting here. There were numerous conversations about it, but I do not know know what it was.

Q. Did he suggest any price that he was going to bid, Mr. Calvin, when you heard it?

A. I do not remember.

Q. Did he just ask "What price are you going to bid"?

A. I don't know whether that was his exact words
895 or not. I do not remember. That was last April or May.

Q. Now I am trying to find out what it is that causes you to remember this conversation. You tell us, you generalize and say you know there was a conversation.

A. I do know.

Q. I would like to know what the conversation was, because that is the important part of the conversation.

A. Well, I do not know what Mr. Rooney said, and I do not remember Mr. Calvin's exact words, but the conversation was in regard to the bidding on the Sarnia bridge job.

Q. You can not remember anything that was said at all?

A. No, not in the exact words, and I would not quote anything but exact words.

Q. I am not asking you to be exact, I am asking you to tell us something of what was said instead of just your conclusions.

A. Well, it was not a conclusion. I heard them talking about the price on the bridge job.

Q. And did you or did you not hear Mr. Calvin say that he would quote the same price, or anything of that kind?

A. I would not say whether I heard Mr. Calvin say that or not, because that is a long time ago and I could not remember.

Q. Did you hear him say that he would quote the same price?

A. I do not remember whether he said that or not.

Q. And you do not know what price he did submit?
896 A. That is what I said.

Q. This was a telephone conversation, was it not?

A. Yes, sir.

Q. And were you sitting outside of the door or were you listening on an extension?

A. Well, I was sitting at my desk just outside the door.

Q. Was your desk just outside Mr. Calvin's door, as his secretary?

A. Yes, sir.

Q. Now let us take another one of these bids, or conversations.—Page 847, at the bottom of the page, Mr. Wooden.—The question:

"Did you hear that?

"Answer: Oh, yes. I did not listen in on the telephone but I heard the man in our office tell the Universal man to attend to his own business, that he knew how to bid."

That, Mr. Wooden, was with respect to the Algoma job.

The Witness: Algoma job.

By Mr. Leisure:

Q. Now you say you heard "our man in the office." Won't you tell His Honor more about that? Tell who your man was that was carrying on that conversation.

A. I think I stated in the testimony that it was Mr. O'Neal.

897 Q. You don't mind stating it again, do you?

A. No, I don't object.

Q. It was Mr. O'Neal?

A. It was Mr. A. E. O'Neal, the auditor.

Q. And who was he talking to?

A. He was talking to a Universal salesman, but I can not tell you the name of the salesman because I do not happen to know that particular man. The Universal called us up.

Q. Now about what was the date of that conversation?

A. Oh, I could not tell you. That has been—well it has been two and a half or three years ago.

Q. And do you remember anything—

A. Yes.

Q. You remember the conversation?

A. Absolutely.

Q. You could not be mistaken about that?

A. I do absolutely remember.

Q. Did that have to do with prices also?

A. That had to do with the bidding and the land grant rate.

Q. And they were discussing what the land grant rates were over certain railroads, is that right?

A. No, sir.

Q. All right, let us have it all. Now don't keep anything back. Tell us the whole conversation.

A. I am answering the questions.

898. Q. Tell me the whole conversation?

A. The whole conversation, as I heard it, was that "We do not need to be told how to bid, we know how to bid," and down went the telephone.

Q. And that one had to do with prices, did it not, because bids have to do with prices?

A. Well, you asked me if they were discussing land grant rates.

Q. I am sorry. I think you misunderstood me. Now what else did you hear besides "We do not have to be told about how to bid," what else did you hear?

A. Well, there was not anything else to hear except the report later from Mr. Johnson.

Q. So that is all you heard?

A. Well, I said that is all there was to hear. That is the fact.

Q. That is the fact. Now how did you know he was talking to a Universal man, if that was all you heard?

A. Because I took the call—when the phone rang I took the call and he asked for Mr. Cree and I said Mr. Cree was not in town, and he asked for someone else to talk to, so Mr. O'Neal was the only one there, so Mr. O'Neal took the telephone, and that is what happened.

Q. Now what did you understand, what do you understand now that he meant when he said, "We do not
899 have to be told how to bid",—what were your exact words?

A. "We know how to bid." I believe that is all, "We do not have to be told how to bid the cement job," or words to that effect.

Q. And you, as you described here the other day, as assistant manager—

A. No, I was not assistant manager, and I was not described that way, I do not believe.

Q. Well, I think someone suggested the other day that you were almost assistant manager. I may have been mistaken.

A. I think you are laboring under a wrong impression on that.

Q. What do you understand now he meant by that?

A. Well, he meant just exactly what he said, and he bid the job and he made an error, we got the job—

Q. I haven't gotten that far along yet. I am just trying to find out what you understood him to mean when he said that.

A. He meant just what he said.

Q. He did not have to be told?

A. He did not elaborate, he meant just what he said.

Q. And as to knowing how to bid, that would have to do with prices, would it not? That is what one bids, is the price, is it not?

A. What do you mean by that?

Q. I mean that he was not being told how to bid, he 900 was being told something about prices, was he not?

A. I would not say one bid a price, I would say that one bid a figure, a certain amount, but I would not say that they bid a price.

Q. So what did you understand that he meant then when he said that, that he did not have to be told about prices at that time?

A. No, he meant that he knew how to bid. The Universal man was endeavoring to tell him about the land grant rate and how to bid the land grant rate, and O'Neal did not listen to him, he told him what I told you he said, and hung up.

Q. Now how do you know he was trying to tell him about the land grant rate?

A. Because he told me what the Universal man said, and the Universal man wrote down to Mr. Johnson and told him we were disrespectful to him, and O'Neal got a bawling out from Johnson.

Q. Now then, there is something else besides the telephone conversation that you know about. Not only did you hear part of the conversation but Mr. O'Neal subsequently told you what the Universal man had said to him. Now will you not go further and tell His Honor what Mr. O'Neal told you?

A. I told you what he said.

Q. Anything else?

A. I told you that he told me there in the office 901 what the Universal man said to him.

Q. And what was that, please, again?

A. Was endeavoring to tell him how to bid this Algoma job, which had to do with land grant rates.

Q. And you understood that to mean the price on the job, did you not?

A. Well, I said he was talking about land grant rates.

Q. How to figure the land grant rates, is that what Mr. O'Neal told you?

A. I don't know whether he used the word "figure" or not. He was talking about land grant rates.

Q. Well, land grant rates are sometimes complicated, are they not?

A. I think so.

Q. And your recollection of this conversation is that these two gentlemen, one representing one company and one representing the other, were discussing the land grant rates, is that what this telephone conversation meant to you?

A. Mr. O'Neal did not discuss it.

Q. I beg pardon?

A. Mr. O'Neal did not discuss it.

Q. That is what the Universal man wanted to discuss?

A. Yes.

902 Q. Now, there is considerable testimony here, Miss Fowley, about the destruction of files in your office. Did you think that that was a proper thing to do, to be destroying files in a business office?

A. Why, I knew it was not.

Q. You do not think at the moment now that it was proper?

A. I know it was not.

Q. Now, Miss Fowley, when did your conscience first start to prick you on that subject?

A. My conscience has never pricked me. I had nothing to do with it.

Q. In other words, you did it under instructions of your superiors?

A. Oh, you mean the letters?

Q. The destruction of letters and papers.

A. Oh, begin again. That is different.

Q. Did you think that was a proper thing to do, destroying letters in a regular business office?

A. Well, I was acting under instructions.

Q. That does not answer my question; I am asking you now if you think that was a proper thing to do?

A. Well, I do not think that correspondence should be destroyed. It seems to me that all correspondence should

be kept, but if the company thinks that this correspondence in their files is detrimental to their well-being
903 and I am instructed to take that correspondence out of there, as far as whether it is proper or not I am not the one to say. That is not my business. I took them out because I was told.

Q. And do you or do you not feel now that that is a proper method of business?

A. I just answered now, I think.

Q. Do you feel that it is proper at the present time as you sit there today, do you think that is a proper way to conduct a business?

A. My opinion is still the same.

Q. That is, that it is or is not proper; which?

A. Well, could the stenographers read my answer on that, your Honor?

Examiner Norwood: Yes.

(The answer is read.)

By Mr. Leisure:

Q. Now, then, you have stated your opinion clearly for the record, won't you also state to his Honor whether or not you think that is a proper method of doing business?

Mr. Wooden: Your Honor, I submit the witness has already answered the question as to what she thought at the time and what she still thinks, as far as that is concerned, and it is just a repetition, telling the same thing again and again.

Examiner Norwood: Counsel's point is well taken.
904 The witness has answered that. But this question appears to be a little different. Read the last question.

(The question is read.)

The Witness: Again I say no.

By Mr. Leisure:

Q. And I again ask you, when did your conscience first start to bother you with respect to that?

A. It never has.

Q. It never has?

A. No.

Q. In other words, your answer implies that you did it under specific instructions?

A. That is it exactly.

Q. And you would not have done it unless you were so specifically instructed?

A. Why, absolutely not.

Q. Page 853 of the record, Mr. Wooden, at the bottom of the page, "I got looking in one that I thought might have something that he should not see and I took out three or four letters out of the files, and I threw them in the waste basket and then he asked for those files that were all right for him to see." So that was one instance where you did not have any specific instruction, wasn't it Miss Fowley?

A. No, sir, I was told by Mr. O'Neal when I came
905 out with the file to look through those files hurriedly, and if there was anything in there that should not be there, to take it out.

Mr. Leisure: I think that is all.

Redirect Examination by Mr. Wooden.

Q. Referring to this Algoma job that you heard Mr. O'Neal have the conversation about over the telephone, you said something about him making an error in his bid?

A. Yes, sir.

Q. Was that error in regard to figuring the land grant rate, or what?

A. It was in regard to the bid. He bid too low.

Q. Did you get the job?

A. Yes, sir.

Q. You said something about O'Neal being bawled out by Johnson for it?

A. Yes, sir.

Q. What do you know about that?

A. Well, Universal wrote Mr. Johnson a letter and told him that his office in Detroit had been disrespectful to them, and they did not like it; so Mr. Johnson wrote a letter and called up about it and checked Mr. O'Neal severely on not being polite to our competitors.

Q. How do you know that?

906 A. Well, I saw the letter, and Mr. O'Neal told me what Mr. Johnson said, and the next time Mr. Johnson came back to the office, he was very cool to Mr. O'Neal because of that.

Q. Do you know who wrote the letter from the Universal Company?

A. No, I do not.
Q. Did you see Mr. Johnson's letter?
A. Yes.
Mr. Wooden: Nothing further.

Recross Examination by Mr. Leisure.

Q. This job that you have just been talking about, that was during the code, wasn't it?
A. I could not say.
Q. Well, if it was, then an error means that it was a bid not in accordance with the code, isn't that so?
A. I don't know.
Mr. Leisure: All right; that is all.
Examiner Norwood: Call your next witness.

HAROLD S. CREE, a witness previously sworn, resumed the stand for further testimony:

Mr. Wooden: Mr. Cree is likewise returning to the stand primarily for cross-examination, but as in the case of Miss Fowley, I have a few additional questions I would like to ask before he proceeds.

907 *Direct Examination by Mr. Wooden (Continued).*

Q. Mr. Cree, did you hear Miss Fowley's testimony this morning?
A. Well, parts of it. I was not interested in hearing it. I did not hear it the other day with the exception—
Q. (Interposing.) This morning.
A. This morning, no. I was here while she was testifying, but I cannot say that I heard it very distinctly, but I think I know about the general observation of what she might say.
Q. Can you fix the approximate time of the Algoma and the Sarnia bridge job?
A. The Sarnia job, that happened after I was kicked out of the Aetna Company and I am not familiar with that. I know about the proposed bridge.
Q. What about the Algoma job; were you there then?
A. I was there at the time of the Algoma job, and I

think you have a paper that speaks about that and other things in rather detail.

Examiner Norwood: What time did you quit?

The Witness: What time?

Examiner Norwood: What time did you get out of the company?

908 The Witness: Well, it would be I judge a year ago last July.

Mr. Zimmerman: I wonder if he could give us that exact date when he left the company?

The Witness: I have a letter to the effect, that I could show you if I can find it among my souvenirs at home or some place, but I think it is July 31st.

By Mr. Wooden:

Q. Do you remember, Mr. Cree, while you were with the company, anything about an executive order of the President that permitted the making of as much as 15 percent concession on prices bid to the government?

A. An executive order?

Q. 15 percent concession below prices filed under the code?

A. I faintly recall something as to that nature.

Q. Can you say whether or not the Algoma job was subsequent to the order or prior to it?

A. It might have been at that particular time. I could not distinctly tell you. That was some time ago and I do not recall the details.

Q. I believe you stated on direct examination a few days ago that you were not a price cutter or a price chiseler in the sale of your cement?

A. I did.

Mr. Leisure: Your Honor, I did not mind Mr.
909 Wooden going ahead and asking additional questions, but it does not seem to me that he ought to now start with the cross-examination of the witness on the testimony that he has already given. It seems to me we have passed over that.

Examiner Norwood: It appears to me he is asking for an explanation.

Mr. Wooden: Your Honor, on further consideration, I think that I will withdraw the question, and I would like to take it up, however, on the redirect.

By Mr. Wooden:

Q. Mr Cree, did you hear Miss Fowley's testimony regarding a letter from a Mr. McKeen to Mr. Calvin?

A. No, I did not hear that. I could not have been in the—because I know Mr. McKeen so very well, he is an old boyhood friend of mine, that if his name, if the name McKeen were mentioned, I would have awakened to stop reading or something and heard it.

Q. Did you get any communication from Miss Fowley about Mr. McKeen's communication to Mr. Calvin?

A. I did.

Q. To what effect was the communication you got from Miss Fowley?

Mr. Leisure: I think we ought to have those documents, your Honor. If your Honor feels that that kind of
910 inquiry is pertinent to any of the issues, I think we should have the documents, and not just this witness' recollection of the written instruments.

Examiner Norwood: Objection overruled.

The Witness: Shall I answer the question?

Examiner Norwood: Yes.

The Witness: Why, it was to the effect that Mr. McKeen was going to call me up in a day or so relative to the proposed government case, which I did not know a thing about. It was going to happen I believe December 1st, and I had not heard about it. That is the effect and the truth of the matter.

By Mr. Wooden:

Q. Did you have a later talk with Mr. McKeen about it?

A. What do you mean "later"?

Q. After you heard from Miss Fowley did you have a talk with Mr. McKeen?

Mr. Leisure: I submit, your Honor, that conversations between this witness and third parties that are connected with this case are hardly material to any of the issues in the case, and certainly are not binding upon any of the respondents.

Mr. Wooden: Mr. McKeen, for your Honor's information, is the attorney for one of the respondent companies.

911 Mr. Leisure: That does not appear in the record, if your Honor please.

Examiner Norwood: Probably he can bring it out. Objection overruled.

Mr. Wooden: You may answer.

The Witness: May I have the question read?

(The question is read.)

The Witness: Well, I had received this letter from Miss Fowley and I could not believe the contents of the letter.

By Mr. Wooden:

Q. Can't you answer the question?

A. Later Mr. McKeen did phone me and talk to me, and Miss Fowley was right.

Q. All right. Will you state the substance of your conversation with Mr. McKeen?

Mr. Leisure: Your Honor, I do not believe that this kind of testimony should be adduced in this way, I do not know what the testimony is, but if it is important, it should be proven in the right way. I object at this time as being incompetent, immaterial and irrelevant.

Examiner Norwood: I think it is part of the transactions, part of the *res gestae.*

Mr. Wooden: I don't know of any other way of
912 proving a conversation except by those who participated in it.

Mr. Leisure: It is pure hearsay as far as the issues in this case are concerned, unless the conversations that he had were with one of these respondents as a conspirator or a defendant. Conversations with his attorney or conversations with third parties are hearsay.

Examiner Norwood: Well, it is the suggestion that this man is attorney for one of the parties. If it should appear that he is an entire stranger, we can strike it out later or disregard it. Objection overruled.

By Mr. Wooden:

Q. Will you describe the conversation now?

Mr. Leisure: I would like to make the further objection on the record that if it is by an attorney, it is a privileged communication which should not be brought out in this way.

Mr. Wooden: Privileged communication by this witness? I think that is rather an absurd contention on its face.

Examiner Norwood: Objection overruled.

The Witness: Well, Bob did call me up, and it was a surprise—

914 By Mr. Wooden:

Q. (Interposing.) When you say "Bob," whom do you mean?

A. I say Bob McKeen, because he is an old friend of mine and a nice fellow. He called me up and asked me if I had talked to any government man regarding this proposed case which started on December 1st, and I had not known a thing about the thing starting on any particular day or that it was going to start even. I told him that I had been going through the biggest battle of my life to forget not only cement, but particularly Aetna cement, and I choose not to discuss it, and he said "Well, I would like to have you if you have talked to anybody, help me prepare a case for the government," and I said, "Bob, I don't want to talk about cement and I don't want to talk about Mr. Johnson or anybody. I have no hate for him or anybody. I have tried to help them out and I do not harbor any hate. I was not born that way and I have not said anything against the Aetna Company; they have lost business"—this was in the conversation—"they have lost a lot of business," but I said, "They have not lost because I have told them not to buy. If I have friends that are still buying Aetna cement to better their particular saving, I am for Aetna cement." And so I told Bob that. I said, "Bob, please forget this." I said, "I don't want to talk about it." I said, "It has been my biggest battle to endeavor to forget cement and es-
915 pecially Aetna cement." And so I closed the conversation. That was it.

917 Examiner Norwood: The hearing will come to order.

Inasmuch as it appears since the formal opening this morning, that some of the counsel who were here last week are not present, I will note for the record that the following counsel are present at the hearing:

Mr. Leisure, Mr. McFadden, Mr. Bond, Mr. Britt, Mr. Werle, Mr. Withrow,—for Messrs. Donovan, Leisure, Newton & Lumbard, representing various respondents; Mr. Edward A. Zimmerman and Harold W. Norman, representing the Marquette Cement Manufacturing Company.

Mr. John H. Herschberger, representing the Universal Atlas Cement Company.

Mr. Richard F. Burgess, representing Southwest Portland Cement Company.

Mr. D. F. McPherson, representing Signal Mountain Portland Cement Company, Consolidated Portland Cement Company, Florida Portland Cement Company, and Trinity Portland Cement Company.

Mr. George W. Jaques, representing Lehigh Port-
918 land Cement Company.

Mr. Robert West, representing Pennsylvania Dixie Cement Company.

(Mr. Leisure requested that it be noted that his firm was withdrawing as co-counsel of the following Pacific Coast respondents,—Beaver Portland Cement Company; Pacific Portland; Yosemite; Calaveras; Riverside, and Santa Cruz.)

Cross-Examination by Mr. Leisure.

Q. Mr. Cree, you have been testifying for several days. Just to get back to the beginning again; do you recall the approximate date when you started working for this company, the Aetna Company?

A. The approximate date was approximately the same time—I remember distinctly as at that particular time Wayne County, I think, showed the country the potential possibilities of the concrete road, and that was along in 1909 or 1910.

Q. And about what was your age at that time?

A. Well, let's see—about 23, I think.

919 Q. And what were your duties when you first started? In what capacity did you start?

A. Well, I jumped into the job as sales manager and salesman; and took right hold of the thing. That's all.

Q. What was your employment before that; what had you been doing before that?

A. Before that—

Q. (Interposing.) Perhaps we will take school. Where did you finish school?

A. Well, I did not finish school. I had about a half a year to go to high school, and for certain reasons I left and went into the coal business.

Q. And were you in the coal business at the time you went into the cement business?

A. I was.

Q. Now, do you recall about what time Mr. Johnson became president?

A. No, I do not. It was a few years after that, I believe. It seems to me Mr. Paine was the first president.

Q. But at any rate, Mr. Johnson has been president for a long time?

A. Yes.

Q. How often did Mr. Johnson come out to the plants or to the office in Detroit; how many times each year?

A. Are you talking, Mr. Leisure, of the first period
920 of my Aetna career?

Q. Well, I would just like to get a picture for the benefit of the Examiner, of the activity of Mr. Johnson with respect to this business? How often he came to Detroit or to Michigan with regard to the business?

A. Well, he would come along probably twice a year, and then later on in recent years he has been there more often.

Q. Now, coming once or twice a year, Mr. Cree, that meant during the 26 years that you were there; that the running of this business was pretty largely up to you and Mr. Lingeman during all of that period of time, isn't that so?

A. Well, that might be.

Q. Well, Mr. Lingeman was your superior? He was the general manager?

A. Yes.

Q. And during the more recent years, during Mr. Lingeman's illness, more and more of the duties were put on your shoulders, weren't they? I will say within the last two years before you left the company.

A. Well, I always had a lot of duties, and I don't know that naturally there would be more things on account of Mr. Lingeman not being there, I suppose.

Q. There naturally would be during those last two years?

A. Yes, sir, probably.

Q. Now, the salaries during your last year,—Mr.
921 Lingeman got $17,000 a year as general manager, didn't he?

A. I don't know. I never had an acquaintance with the books to any extent.

Q. Well, you do know your salary for the last year that you were there was $8,550 a year?

A. Approximately that, I believe.

922 Q. And that Mr. Johnson's salary was $6,250 a year?

A. I don't know definitely.

Q. You don't know Mr. Johnson's salary?

A. No. I knew he was getting a good salary, no doubt.

Q. Now, as I understood you to say a few days ago, you were the general salesmanager, you had many other duties but your principal function in the business was that of salesmanager?

A. Well, I think that is prevalent over advertising, advertising and traffic work, was all.

Q. Things that had to do with selling?

A. Selling, yes. Selling, freight rates application, advertising, that is right.

Q. And the selling of cement, like any other commodity, is a very important part of that business, is it not?

A. It is.

Q. And you had full charge of that?

A. Well, I would say I had the general supervision. It was left up to me to steer the ship and see that it properly progressed.

Q. So that in that important position, Mr. Cree, you became aware of the difficulties and the problems of making money in the cement business?

A. Yes.

Q. Is that not so?

923 A. Yes.

Q. Now, Mr. Cree, I want to ask you a very important question. Do you feel bitter towards the cement industry or do you feel that you can discuss this problem today without any bias and discuss it fairly and honestly?

A. Well now, Mr. Leisure, I thought that in the previous testimony I had brought that out, I tried to bring it out and I will tell you again that I naturally did not inherit such a thing as hatred, and I do not have any hate towards anybody in the cement business as a company or individual. I have no hate towards Mr. Johnson, I feel as I have always felt; but, however, I regret for certain things. I just feel sorry for him, that is all. As far as hate is concerned, there is nothing of that kind at all.

Q. And you feel you can discuss it fairly and honestly?

A. I know I can.

Q. We will see. When you were selling in Michigan, and as the cement business became more and more important and competitors increased, when you set a price for your cement was it possible for you to sell cement for a penny more than your competitors were selling it?

A. Was it possible for us to—

Q. I mean, that is in a competitive market. You sold cement at what your competitors were selling it at, did you, or did you not?

924 A. Well, I might answer it this way: Our—

Q. Let me put it in another way. Let me put another question and see if I can clarify your mind on it. If your competitors were selling cement at one price in Michigan did you consider it good business to try to sell your cement at a higher price?

A. Well, I might answer that this way, that our prices showed for years a higher return—

Q. (Interrupting): I am asking you now as an expert, Mr. Cree, based on some of these questions that I asked you a moment ago as to the operations of your mind, I am asking you now as an expert witness, with 26 years experience, whether or not, without giving you any specific instances, whether or not you considered it good business in Michigan to try to sell your cement at a penny or five cents more than your competitors were selling it at?

A. Well, no.

Q. That is obvious, is it not?

A. Yes.

Q. You would not get the business, would you?

A. The chances are we would not, unless we had some—

Q. (Interrupting): Better grade of cement?

A. —better grade of service.

Q. Let us get to the better grade of cement.

By The Examiner:

925 Q. Suppose you had a penny advantage on them in the matter of the deliveries and everything, would you mark it up then a penny and take advantage over your competitors?

A. Well, it would be pretty hard to realize a penny advantage.

Q. Substantially that, we will say.

A. But the truth of the matter is, of course, that we tried to follow our competition and to get as much for our cement as we could with respect to that competition and with respect to our return at the mill, you know. There are two prices, destination and return price at the mill, and it is a matter of record that our prices at the mill, in the long period of 26 years, have been much higher than the average.

By Mr. Leisure:

Q. But it was good business, in answer to His Honor's question, was it not, to sell your product for whatever the market was? It was good business to try to sell your goods in a favorable market, is not that so?

A. Yes, that is right.

926 Q. All right. Now let us take another picture. With your 26 years experience do you consider it good business to try to undersell all of your competitors and sell it for a penny or five cents less than the going market price?

A. No, because if you have a good product then you sacrifice the principle of price.

Q. And there are other very good reasons. Is it or is it not in fact that competitors would drop to the new price to meet your competition?

A. Oh, in the general practice of it, I presume that would be correct.

Q. And if that practice continued, you have seen a good many instances of competition in your 26 years experience—price wars are not profitable to anyone, like other wars, are they?

A. That is correct.

Q. And people who try to undercut and cut under 927 the market price might find one of two situations: If they persisted in it they might find either the entire market becoming the price that they cut their product to, or they might find that their competitors were still further precipitating what is commonly known in your industry, and other industries, as price wars, is there any question about that?

A. I think that is correct.

Q. So that, by and large, it was your object to try to make money for your company and you considered it good business to sell cement at the going market prices, is that not so?

A. Well, that is not completely so.

Q. I said "by and large." You may have had some exceptions, but is not that principally correct?

A. Principally, yes, with exceptions; with reservations I believe you are correct.

930 By Mr. Leisure:

Q. Mr. Cree, is it not a fact that this competitive
931 selling of cement, as you have described your operation, meaning the market price, tends to create identical prices of a standard product?

Mr. Wooden: The same objection.

Examiner Norwood: You may answer that based on your experience, whether or not it did create identical prices.

A. Well, I still adhere to this though—

By Mr. Leisure:

Q. Let me insert "in each community". You as a cement man may have some objection to my lawyer's description of that. I mean in each respective community the competition there tends to quote identical prices?

A. Well, I will say again our prices,—we never got out quotations generally until we came to the time of the code, when we were automatically forced to publish quotations for the first time in the history of the Aetna Company.

Q. Let us confine it to since the code, so you can focus your attention on my question. I want you to tell His Honor whether you found that this system of trying to meet prices and sell your cement did not tend to establish uniform prices in a community, in each particular community where that cement was sold?

A. Of course lots of times we sold cement under these so-called published prices that we would see around.

932 Q. That does not answer my question.

A. Our prices were fluctuating, which is evidenced by looking or glancing at our bills, you will see where we did not have a set price, you will see where our prices fluctuated every month, for the reason that our destination prices must have been a little different now and then. Of course we realize that different quotations went around and we had truck delivery to offer our consumers, and I think therefore we could bring some of that cement—

Q. (Interrupting): You are not answering my ques-

tion, Mr. Cree. His Honor has limited me to a few questions on that and if you do not mind I would like to just get your answers. You have already testified as to what happened in regard to trying to sell cement above the market; you have also testified as to what happened by trying to sell cement below the market. Now I am asking you the obvious third question, which follows logically, whether or not that practice in any given community did not tend to create identical prices?

A. Well, generally it would, among the supply dealers; on small jobs it would naturally.

Q. To the ultimate consumer?

A. Yes.

Q. Now there was a great deal of talk during the days of your testimony here about these various meetings. Will you tell His Honor whether or not it is a fact that
933 most of these meetings were held during the code period?

A. Well now, I think it would be a matter of record on those exhibits as to the time. If it is within the time of the code—it would be self-proven.

Q. And while you were acting in this important position that you were acting in you did not feel that you were doing anything wrong in discussing problems at a code meeting which enabled you to comply with the requirements of the code, did you? I address your attention to a letter of yours, which you have already read, dated May 20, 1935, in your paragraph 3,—Exhibit 28, Mr. Wooden,—paragraph 3 at the bottom of the page, in which you say,—this refers to the Algoma quotation. Is "Algoma" correct? Is the pronunciation of that "Algoma"?

A. Algoma, I believe.

Q. "It is a fact that common horse-sense would prompt us not to violate the cement code, and on a very small order, and especially one with the Government on the purchasing end."

So that you had in mind trying to live up to the code while you were operating during that period, did you not?

A. Yes, I did, or we did.

Q. Yes. Now without taking a great deal of time, to take these up individually and keeping you two or
934 three days on each one, I want to take these complaints and criticisms and ask you one question about

a majority of them. Were not most of them during the code period?

A. Well, having been forced to carry for years the burden of all these details and everything, it is pretty hard to ascertain any particular date.

Q. The record would show that, Mr. Cree.

A. The record would show that, would it not?

Q. I am asking for your recollection. So as to these meetings during this period was not it the spirit of the meeting to find out and try to comply with the requirements of the code? Was not that the spirit of the meetings?

A. Yes, that is correct.

940 Q. Mr. Cree, I am not going to take up all of these incidents, but let me ask you about the
941 Kalamazoo incident that was testified to. I understood, and I am afraid His Honor understood, that it was the competitors who made the division of that business. Now would you just clear that up for us, as to exactly what happened there?

942 Q. I want to get the record clear. Do you recall it? You recall, do you not, that it was not the competitors that divided this business, it was the purchasing agent who said he was going to divide it and did divide it?

A. That is correct.

Q. I am sure you wanted to correct that. Mr. Cree, just one further question. Weren't you mistaken a while ago when you said that this lawyer, Mr. McKeen, wanted you to help prepare the government case? You did not mean he wanted you to help prepare the government case, did you? I understood you to say that, and I think there is a mistake. At least, I want you to explain what did you mean if that is what you said?

A. Well, that is what he said, that he wanted me to come down and talk it over with him about this proposed government case.

Q. You may have said "proposed government case," but I misunderstood you.

A. Pardon me. I don't know whether I used "proposed" or not. But he referred to the case, and for the first time I knew it was coming up, December 1st, I
943 think he made the statement, and I told him I had not been downtown for quite some time, that I was working in the sticks to try to redevelop myself; and I

certainly wanted to forget cement and especially Aetna cement.

Q. Mr. McKeen was counsel to the Aetna Company, was he not, one of the counsel?

A. When I left, he was. Bob and I used to advise together on different things on how to better carry on the Aetna Company.

Q. And when a case was about to be filed against his company, he got hold of a man who had been with the company 26 years and suggested to him that he give him some cooperation, isn't that about what Mr. McKeen did?

A. That is about it.

Mr. Leisure: I think that is all.

Redirect Examination by Mr. Wooden.

Q. Mr. Cree, did you consider that Mr. McKeen's request that you help him prepare respondent's case in this proceeding was a proper request under the circumstances?

A. Well, I did not think it was quite proper at that time, and I was disappointed. Whether I was right or not in that disappointment, I don't know. It might have been impulsive and it might not, but I did think it strange that I should be bothered by hearing from Bob McKeen or
944 anybody about my past associations with the Aetna Company, because that was my battle to eliminate that from my mind.

Q. Now, in this matter of the loss of the Aetna Company for some years past, do you know whether or not other cement companies were showing losses also during the same period?

A. Well, that particular period was through what you call the depression period and I presume that every company—most every company—lost some money, and I do know if we had not in that particular period—I have records at home or I ought to have them, because I always maintained an office at home and worked nights and days and holidays—I have records home, in the State of Michigan for one year—for three years, and it may be in that period, that I sold a lot of cement there in competition, and it was on maybe two or three hundred thousand barrels of cement a year, and I did it on very competitive bidding—I don't think my average lower price in getting those jobs would run over 3 cents a barrel on it all. It

was a wonderful record, and how I had a horseshoe on my neck to figure out those things, I don't know, but we got the business, and at that time it was figured up that if we had not gotten that business, which you might say was highly competitive, the Aetna Company would have lost so much more money, and the other thing was that if the Aetna Company had decided not to take any business in the trade or anything and locked the door and threw
945 the key away, why, they are out of business, so when you think about losses that you speak of there—that I must say in justification of my sales, that they were very competitive and the average was always comparative with Mr. Crapo and his activity.

Q. Will you state whether or not in your opinion the establishment of what you call the retaliatory base prices at Bay City had anything to do with your losses?

A. Do you refer to the time that the Wabash Company put on a lower price?

Q. I mean after the Indiana letting on which you were the lower bidder?

A. Well, naturally, when you get walloped 10 cents a barrel, and if you have any tonnage, it is going to cost you money; it is going to cost that somebody money whose location it is applied to.

Q. That cut of 10 cents meant, I assume, that you could not get more than that on even your most profitable business, your nearby business?

A. Of course, one time previous to that there was a slap of 20 cents a barrel.

Q. What is your answer to my question in the particular form that I asked you?

A. That we could not get 10 cents a barrel more?

Q. Even on your most profitable business.

A. No.

946 Q. And on the business that you took away from your plant, farthest away from your plant, it was much more of a loss than the 10 cents involved, wasn't it?

A. The 10 cents would apply—they put that base right on our plant. That would apply as far as we used that freight rate. It would be uniformly 10 cents.

Q. Under those circumstances, was the base price the greatest net that you could get anywhere?

A. Yes.

Q. And as you went away from your mill, your net became less, didn't it?

A. That is true.

Q. You said something about making a higher price return than competitors. By "price return", I take it you mean mill net?

A. Mill net, yes.

Q. Do I understand that you showed a higher price return than competitors even though you quoted and sold at the same delivered prices?

A. Well, we did not always sell at the same delivered prices.

Q. I understand you did sometimes?

A. Yes.

949 By Mr. Wooden:

Q. Were you able to figure mill nets of competitors?

A. I tried to figure them.

Q. And how did you do it?

A. Well, from their general activity in the district, and the quotations that they had issued around that I would pick up and see around at different places.

Q. If you had a quotation of a competitor of a certain delivered basis, how would you figure the mill net?

A. If I found a quotation in a particular dealer's office from a company?

Q. Yes.

A. I would just merely deduct the freight rate to that particular—what I would think would be the shipping point.

Q. So that you were in a position to know what the mill nets of your competitors were?

A. Yes.

951 Q. Mr. Leisure asked you something about price wars and whether they were not unprofitable. However, the fact remains, does it not, that such price wars have existed?

A. Have existed?

Q. Yes.

A. Yes, I would say the State of Michigan has been highly competitive ever since I have been associated down there.

Q. Were you one of the leaders, so to speak, in making it competitive?

A. Well, I could not say that, no. I will say again that I always had a lot of pride for the quality of our particular cement and the quality of the service that we
952 had instigated around in these different warehouses, boat and truck transportation, and we had something to offer. I thought it was sound and on an economic basis that would create a lower cost of the operation to the particular consumer, and I could not see any reason why I should go around and ring doorbells to try and give any further money away if I could find out what the other fellow was doing, by his quotations or his activities; why, it was all right to have an altruistic spirit, but I had to think of the Aetna Company, you know, and I tried my best to get the best price possible at all times.

954 Q. Do you consider the establishment of what you call the retaliatory base, price war or price competition?

A. That would speak of a war-like nature, wouldn't it?

Q. I want your view.

A. I would say a war.

Q. Do you think a retaliatory base establishment is legitimate competition?

A. No, I do not.

Q. Do you think price competition is legitimate competition?

A. Proper price competition, I do.

Q. Then you do draw a distinction between price
955 wars and price competition?

A. Evidently so.

Q. Did you consider that Aetna was the aggressor or initiator of a price war?

A. No, by no means.

Q. Did you believe that the Aetna was simply a price competitor?

A. That is all.

Q. Now, about this matter of extending the area of your backyard in which you might take business,—did outside mills come into Michigan?

A. Did outside mills ship into Michigan?

Q. Yes.

A. Yes.

Q. Who were some of them?

A. Well, there were shippers outside of Michigan.

Q. Name them.

A. Universal and Wabash and Medusa.

Q. Were they extending their backyard into Michigan when they took business in Michigan?

A. Well, Michigan would not really be termed the backyard to any of those companies.

Q. You would not call it their front yard, would you?

A. Well, you might call it the orchard. Maybe the picking was pretty good.

956 Q. When you went into Indiana on the Indiana Road Commission bids in 1933, did you consider you were getting out of your own backyard and into any one else's backyard?

A. Well, when I mentioned backyard, I think when anybody speaks of the backyard, you speak of that particular part of activity that is associated around your mill or distributing silo, where you are in a better position maybe than your competitors to give an economic service. Now, in rail shipments made from Bay City plant, we enjoyed, I found out, some pretty good rates in Indiana, and trying to develop a little tonnage through this depression, I saw the price was pretty good down there too, and it gave us a nice net return at our mill, and I thought that it was perfectly all right to ship down there; they were shipping up in Michigan, and it was all right.

Q. Was there a higher price level in Indiana than there was in Michigan at that time?

A. Yes, because we got a nice—on that order we got a nice net return at our mill, I know, and it helped us out quite a bit.

Q. It was quite a large order, wasn't it? How much?

A. Well, if I remember it, about 125,000 or 150,000 barrels.

Q. Can you say about what your net return on it was?

A. Can I do what?

Q. Can you state about what your net return on it was?

A. Well, it was higher than the net return on right
957 around Detroit territory. Just what the net return was, I cannot say.

Q. But you are quite sure it was higher than the net return nearer your mill?

A. Yes. With the exception maybe of right in Bay City proper, but when you get beyond that, beyond that 25 or 27 cent freight rate, the net return coming from Indiana was higher, and that is the reason it looked attractive.

Q. Well, what you did then was to go into another territory where you had not before that been doing business, and take a large order at less than the price prevailing in that territory, is that right?

A. Well, you are right in some respects. We had been doing business in Indiana and we did have a forward look to furthering our business down there.

Q. Had that been commercial business or state business?

A. A combination, I would say.

Q. When you made delivered prices that were lower than those of your competitors, would you say you were competing with them in price when you did so?

A. That I was competing?

Q. Yes.

A. Do you mean a particular job?

Q. Yes.

A. I was competing according to my version of that 958 particular competition on that particular job.

Q. Did you encounter any objection or criticisms when you made the same delivered prices that your competitors did?

A. Did I encounter criticisms?

Q. Yes; when you made the same delivered prices that your competitors did?

A. I am not aware of any. I do not see why they should have had any criticism forthcoming on that.

Q. In other words, the criticisms all came when you made the prices below your competitors delivered prices?

A. You mean price criticisms?

Q. Yes.

A. Well, that would naturally be correct.

Q. In other words, the criticisms came when you thought you were competing in price?

A. Yes. I might have been right and I might have been wrong, but they thought I was wrong.

Q. Just how familiar were you with the code during its existence? Did you ever read the Cement Code?

A. I remember having read it, yes.

Q. Did you ever have any understanding that the code required you to enter into agreements from trucking with your competitors?

A. Well, I cannot recall the code in detail to that extent.

Q. Do you know whether or not in your understand-
959 ing of the code it called for you to adopt and carry on practices which made your delivered price identical with that of your competitors?

A. Well, that was the prevalent understanding, I believe, that such thing could and should exist under the code.

Q. Whether or not the code on its face provided for it or not?

A. Well, it was the feeling that that was the spirit of the code.

Q. On what do you base your statement that that was the prevalent feeling?

A. Well, my recollection as to the particular knowledge of thought at that time.

Q. Is it based upon contacts with competitors?

A. To a certain extent, yes.

Q. Now, on cross-examination you stated that you thought most of the complaints and criticisms that came from competitors about your price and trucking policies occurred during the code. Do you know what the code period was?

A. Do I recall what?

Q. Do you know the length of time the code was in effect?

A. It is a matter of record; I cannot remember the particular dates.

Q. Do you know whether or not the meeting at which Mr. Johnson read his statement in December, 1935, was
960 before or after the code?

A. What meeting do you refer to and what statement?

Q. December, 1935. It is a matter of record here in the exhibits. The time that you were present when Mr. Johnson read his statement about the policies of the Aetna Company?

A. Well, of course, that is a matter of date and record. That was after—

Q. (Interposing.) I am just trying to find out about how much you know about when the code period ended.

A. That would be after the code.

Q. All right.

A. I believe.

Q. And what about the Indiana Farm Bureau matter that came up in the summer of 1936,—was that before or after the code?

A. You would have to refer to the dates to be accurate; I cannot remember that.

Q. We can do that but I want to know just how much you know about those things.

A. I see.

Q. Now, there seems to be a little conflict between what I understood you to say on cross-examination and what I think the record shows you said on direct examination regarding that Kalamazoo order, where after the order was taken, it was divided between your company and two
961 others. Who made the division of that order?

A. Well, I think it was the purchasing agent at the city of Kalamazoo, if I remember right.

Q. I am showing you, Mr. Cree, your testimony on page 656 of the record. Look that over and see if it calls for correction, or whether that statement there does represent the facts of the matter?

Mr. Zimmerman: May I ask, is this a correction which the witness has suggested after going over the testimony? You certainly don't want him now to simply reiterate testimony?

Mr. Wooden: No, he has made no intimation of any kind that that needs correction.

Mr. Zimmerman: It is just simply something that you felt should be gone over?

Mr. Wooden: That is right. I just want to straighten out the record on it and get the facts.

The Witness: Well, now, what do you want me to tell you?

By Mr. Wooden:

Q. I understood from your direct testimony that you were the initiator of that division of the business in the Kalamazoo case. Now, you said on cross-examination that you thought the purchasing agent of the city divided the business. Now, which is right?

962 A. Now, if I recollect there, we had that particular business—

Q. (Interposing.) When you say you had it, what do you mean?

A. Well, we had the order. It is a record with the Cement Institute, and if you want to get the details, Reiter can give them to you, or somebody over there.

Q. You had the entire order, is that correct?

A. I believe it is correct that we had the entire order,

and then it came to a division of the thing, and I felt that I had enough business and did not have to worry about that particular order if it did want to become divided down there, so that is what happened. In other words, I maybe could have blocked a division of the order.

Q. Did you have a right, in your opinion, to fill that entire order?

A. If I remember correctly, we had that particular right.

Q. On whose initiative was any suggestion made about a division?

A. Well, there was a confliction there with the code, I believe, or something, and that is how it happened. That was during the code time.

Q. Who brought up the question first about dividing that business?

A. I think that originated from the Kalamazoo office.

Q. The Kalamazoo office of what?

963 A. I think it first came to my attention from the purchasing agent of Kalamazoo.

Q. Do you mean that he suggested that the business be divided, or what?

Mr. Zimmerman: I submit, if your Honor please, this witness is being about as fair and square about this thing as he can be. There is no reason for cross-examining so persistently merely because it does not agree with what counsel thinks it ought to be.

Mr. Wooden: He is perfectly fair, but—

Mr. Zimmerman: (Interposing.) He has answered the question two or three times.

Examiner Norwood: Let him answer it again.

The Witness: It is hard to remember all those things, but we got that order and I believe this is past testimony, but here is how we got it. I quoted on that thing according to the previous quotation we had given to the city of Detroit, which in detail took in the plea of this particular concern to the city of Kalamazoo over a year's period, which was contrary to the code set-up at that time, and these other companies came in and bid, I believe, on a quarterly requirement, so it threw us automatically low on the whole thing, and that became the origination of the discussion, and so I just wanted to be fair about the

964 thing and passed out of the picture and took a share of it and did not worry about it because I never worried about it.

By Mr. Wooden:

Q. Where did you get the idea that the code prohibited taking the business for a year or on a yearly order?

A. Well, at that time in the code there was some declaration of so-called distribution of cement.

Q. Declaration by whom?

A. By the code authority. You have the record about that that would recall it, better than I could tell you, probably.

Q. Did you ever get any information on it from Cement Institute officials?

A. On this Kalamazoo affair?

Q. Yes.

A. No doubt we did receive some correspondence on it. Those contracts were reported, so naturally we did; but I cannot remember the details of that.

Q. Let me ask you this question. Did you or did you not share this Kalamazoo business with two other competitors in any degree because you had been criticized for taking the order for a year's supply?

Mr. Leisure: Now, I object to that, if the Court please. He can tell what happened and what the facts are, but as far as summing up this case, the witness has already told us what happened.

965 Examiner Norwood: Objection overruled. He can tell if he knows. Can you answer that?

The Witness: I do not believe there is anything further that I can say, except that we had the order and it was later divided and we were agreeable to it. It was not according to the code, as I understand, and we let these other companies down there, Wolverine, I believe, and the Consolidated come in and get some of that business. That was all right. They were right there.

By Mr. Wooden:

Q. They took it at the same price you had already taken it?

A. They took it along the same terms, I believe.

Q. Including furnishing over a year's period of time?

A. I believe they had agreed to that.

Q. Was there any further complaint about it from any source?

A. No, I don't remember any.

Q. How did you happen to divide that with Wolverine

and the other company rather than some other particular company?

A. Well, I believe they were the important—well, they were you might say kind of local to that district, and I believe they had always bid on that work, and I believe they were the only bidders on the job.

Q. They were the only bidders on the job?

966 A. I don't know whether they were the only ones or not, but they naturally would, at Kalamazoo.

970 Q. Mr. Cree, when you speak of allowances to contractors that you sometimes made, in what form were those made?

A. Well, we have made allowances to contractors on particular work.

Q. Did you sell them at one price and then make a later deduction from the price or was your allowance included in the price that you first made?

A. We have at some times made allowances under the original price; an extra discount, in other words, you might term it.

Q. And at other times what?

A. At other times what?

Q. Yes, at other times what did you do?

A. Well, it would be termed an extra discount. We have done that.

971 Q. Were those allowances at times secret?

A. Well, what do you mean by "secret"? We were aware of them.

Q. I mean were they made without the knowledge of your competitors?

A. Well, I would think that our business was run without the knowledge of our competitors. If I could have it that way it was done.

Q. Did you ever have any criticism or objection offered by your competitors to your making these allowances, or any kind of allowances to contractors?

A. I can not remember any specific incident, no.

Q. Now as to your truck delivery, was that ordinarily made in your own trucks?

A. We never owned our own trucks, we controlled trucks. We never owned and operated our own trucks, but we controlled the trucks.

Q. Handled by independent truck carriers?

A. Independent truck carriers.

Q. Were the truck rates different from the railroad rates?

A. In some cases, yes.

Q. Were they lower than the railroad rates?

A. In some cases, yes.

Q. In handling railroad rates did the amount of the railroad rates ever pass through your books as a cost
972 of your doing business?

A. No, that was not construed as a cost.

Q. Did the cost of the truck delivery handled by independent truckers ever pass through your books as a cost of delivery to you?

A. Well, the actual cost of delivery to destination, the job, whether it would be by rail or truck, would be considered the cost of getting there.

Q. But I am talking about how your books treated it. Did you treat it as part of your cost of doing business?

A. I do not think so.

Mr. Wooden: That is all.

Mr. Leisure: No questions.

Examiner Norwood: Thank you, Mr. Cree. May this witness be discharged now?

Mr. Zimmerman: Your Honor, I have one more question that I would like to ask him.

Examiner Norwood: Go ahead.

Rerecross Examination by Mr. Zimmerman

Q. You did also make some special allowances to contractors that called with their own trucks, did you not?

A. Mr. Zimmerman, you see you are taking me over quite a period of time and you must realize that I might be a little hazy about some of the details. Now you
973 are talking about the trucking of cement. The Aetna Company did at the start several years ago afford the trucking allowance at their mill that was commensurate with the going freight rate at that time.

Q. So as to in any way equalize the two?

A. No. When they picked this cement up they were given a rail allowance, which was the only established rate that we had at that time to allow them, to compensate them for their trucking of the cement from our warehouse to the location.

Q. How long did that continue?

A. Well, that continued for a few years and then it was changed.

Q. What years?

A. I can not tell you.

Q. Well, would it be as late as 1935?

A. No, it was before that when that practice was discontinued.

Q. Discontinued in 1934?

A. Well, it is a matter of record probably on some of that stuff that you have gotten here.

Q. Would that be as nearly as you can tell it?

A. I think it was discontinued previous to that.

Q. You would not know whether it was a few months before or after that year?

974 A. I can not recall the actual date.

Mr. Zimmerman: All right, thank you.

By Mr. Wooden:

Q. Do I understand, Mr. Cree, that you sometimes made a mill price and turned the cement over to the trucker at the mill and washed your hands off?

A. We did at the start there, I believe, that was customary.

Q. Will you state whether or not your mill price under such circumstances was or was not equal to the destination price less the rail freight?

A. That is what is represented. It represented the home destination price at that particular picker-upper, I might say, less the published freight rate.

Q. All-rail freight?

A. All-rail freight, which was the only thing that was published.

Mr. Wooden: That is all.

975 F. R. JOHNSON, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am interested in several different concerns and businesses. I am chairman of the executive and finance committees of What-Cheer and Hope Mutual Life Insurance Companies, and chairman of the executive committee of

Heaton Peninsula Company which is located in Boston in the business of manufacturing small tools for sale to
976 the shoe retail trade. I am also connected in the management of the United Shoe Machinery Company. I am president of the Aetna Portland Cement Company and have been connected with the company about 30 years, as president for approximately 22 years.

Q. What is the capitalization of the Aetna Portland Cement Company?

A. $500,000.

Q. Is that all common stock?

A. Yes, sir.

Q. You have no preferred stock?

A. No, sir.

Q. Have you any bonded indebtedness?

977 A. No, sir.

Q. During your presidency over this period of time did the Aetna's business develop so that you built a second mill?

A. Yes, sir.

Q. Was that second mill at Bay City?

A. It was.

Q. Was that mill constructed out of the earnings of the first mill that you had?

A. Yes, plus a certain amount of money which we borrowed, about $300,000 or $400,000.

Q. Was the borrowed money repaid?

A. It was.

Q. Are you one of the larger stockholders of the Aetna Company?

A. I own about one-tenth of the stock.

Q. Who are the other large owners?

A. Well, there is the Paine Estate and the Evans Estate, I think are the two largest owners.

Q. Has your proportion of the ownership ever been any larger than the 10 per cent that you have named?

A. No. I think I have once or twice added a little bit to it, which brings it up to the present time, as between myself and my wife, as about 10 per cent of the total.

Q. Did you occasionally go out to Detroit to ascertain how the affairs of the Aetna Company were going
978 along, and review its progress and consult with your associates there?

A. I did go out, yes, sir, from time to time.

Q. About how often?

A. Oh, about twice a year. I did not feel it was necessary to go any oftener. The general manager was to make reports to me.

Q. Did you from time to time send instructions to your Detroit officials giving your ideas of how the business should be run?

A. I did.

Q. I am showing you now Commission's Exhibits 19-A and B; those have been identified here as copies of letters which you wrote while in Detroit on one occasion to the gentlemen whose names appear thereon. Do you remember the occasion and the circumstances under which they were written?

A. I wrote those letters from Detroit, or this letter from Detroit, expressing, as I have done here, believing that it was unnecessary and unfair to establish a base price at Bay City or thereabouts, because that was really putting a base price in our back yard, and that we felt, by putting this base price that way, we were unable then to get what the general market was willing to pay right in our back yard.

Q. Did you consider the establishment of that base price in your back yard, as you call it, an act of retaliation for anything that you had done?

979 A. I did not.

Q. When I say "you" I do not mean you individually, but anything that your company had done.

A. No, I did not.

Q. Do you recall about that time any bidding that your company engaged in in the State of Indiana, on the Indiana Road Commission business?

A. It was brought to my attention. I did not know about it at that time but it was brought to my attention that they had quoted in Indiana.

Q. Who brought it to your attention?

A. My impression is that Lingeman brought it to my attention, my general manager, and I think others too.

Q. Who else?

A. Well, I do not know.

Q. Did any of your competitors bring it to your attention?

A. I do not know. I should not be surprised, because it caused a good deal of furore.

Q. Furore where?

A. Well, among the trade generally, of those quoting in Indiana.

Q. Why should it cause a furore?

A. Because, as I understand it, there was a question of using some base price which should not have been used.

Now what that base price was and why it was used
980 I do not know, because I am not in touch, and was not in touch with those details.

Q. Did you know about the use at that time of the so-called Wyandotte base?

A. I did not know of it until it was brought up afterwards in this general discussion.

Q. You say there was a general discussion. Between whom did it take place?

A. Between Cree, Lingeman and myself.

981 Q. How did it come to your attention that there was any furore created by your bidding on that occasion?

A. They told me there was.

Q. You mean Lingeman and—

A. (Interposing.) Lingeman and Cree.

Q. Did you have then any confirmation of that from any statements made to you by competitors?

A. I don't remember.

Q. Did you consider your concern free to use any base it cared to in quoting on that Indiana business?

A. That is a thought I did not give. I don't know. I never quoted on prices myself. I never made up prices; I don't know anything about base prices and I never got into it.

Q. You said something about using a base that should not have been used?

A. Yes, sir.

Q. Why shouldn't it have been used?

A. Well, I don't know except what Cree and Lingeman told me that they thought that perhaps they had made a mistake in using a Wyandotte base. Now, what that meant, I don't know.

Q. Showing you Commission's Exhibit 20-A, B, and C, do you recognize that as a communication or a copy of a communication that bears your original signature?

982 A. Yes, sir that is my letter.

Q. Your signature?

A. It is.

Q. Now, you describe here a conference which Mr. Cree and you attended on "Friday last," this being dated October 3, 1933. With that to refresh your recollection, if necessary, but I refer that you just give us in your own words what you can now remember about conference?

A. Well, my opinion of that is that this was a meeting held, I believe, in Chicago. This came in—this was in 1933. At that time we were considering the code, we were considering what to do to work under a code—now, this is my recollection,—and we got together to talk over and see what was the best fundamental things that we could work out that could be presented eventually in our arrangement of the code. That is my recollection of it. Now, then, I go on here from paragraph to paragraph, and I trust—I don't suppose you want me to read this letter, because you have already read it.

Q. That is right.

A. I stated here that it was stated that the other cement concerns, in writing this letter,—it was to my people. When I say "my people," I mean Lingeman and Cree and the Aetna Portland Cement Company; no one else.

Q. But who was writing to them?

983 A. I don't know. I was writing to them this letter.

Q I thought you were talking about someone else writing?

A. No.

Q. All right.

A. And I wrote to them in a pretty definite strong way, for the reason that I had been stared here right in the face with a loss in two months' time of about $400,000, and I was disturbed about it, and I had a feeling that there was some poor merchandising work being done by our people, and while I could not prove it at that time, while I did not get enough information to make a definite statement, I wrote this letter pretty clearly. I had heard that people, customers and competitors called up our office frequently—a great many times—and tried to get an answer yes or no, "What do you know about this? We hear that you have sold goods in Indiana or some other place at such and such a price. Is it so? We do not want to meet such a price if it is only salesmen's gossip, but if it is a fact, we would like to know it." They could not get an answer. It was an evasive answer.

Q. Who brought such a matter to your attention?

A. Well, I think the man who—well, now, I cannot tell you.

Q. Was it only one person or more than one person?

A. It was more than one person who spoke of that condition.

Q. Were those persons representative of your competitors?

984 A. Yes, sir.

Q. Did they include any of the concerns that are named in that letter there in the first paragraph?

A. They may; I don't know.

Q. Well, now, I notice one thing here, Mr. Johnson, in this letter where you said you admitted that you made a blunder when you quoted on the government-Muskegon-Holland and Michigan jobs in March, 1933?

A. Yes, sir.

Q. That was long before the code, wasn't it?

A. Yes, sir. I say it was. I don't know.

Q. It was even before the legislation authorizing codes was passed, wasn't it?

A. Well, I don't know the date.

Q. And you say that you promised that this would not happen again?

A. Yes.

Q. Do you know what kind of a blunder was it that you made that you promised would not happen again?

A. I don't know except that Lingeman and Cree told me that they had made a blunder there on quoting on that thing. Then I said that, "By God, you did, but you won't make it again."

Q. Was it a blunder in quoting lower than the other bidders?

A. That I cannot tell you. It was a blunder.

985 Q. You say further that you admitted at this meeting that "You quoted regularly on the Indiana letting in December, 1932, and you quoted irregularly and different from the others in March, 1933 by using the Wyandotte base."

A. That is just what they told me.

Q. Well, what was irregular about using the Wyandotte base in that situation?

A. I don't know, except they told me it was rather irregular to do it.

Q. Was it irregular because it was different from the others?

A. I don't know.

Q. Well, you went on to say that the result of that bidding had been rather disastrous, as you saw it. In what way?

A. In any bidding done by anybody at any time which is lower than one's own base price, and we had our base price—we had our own market price, would bring trouble and disaster also.

Q. In other words, you were of the opinion that you had to make the same price that everybody else did or face disaster?

A. I figured this, that if we made a lower price to one man, we should have to do it to all of our customers all around, and if we did that to all of our customers, other people would have to follow and that would be disaster.

Q. Did this retaliatory Bay City base following 986 the Indiana road bidding in March, 1933, did that illustrate what you just had to say?

A. I could not say that it did, no.

Q. Was there some connection in your mind between that Bay City base established by your competitors and your Indiana letting?

A. Not in my mind at all, sir.

Q. Even though you wrote in April, 1933, protesting to Mr. Rooney and Mr. Crepo about the establishment of that base?

A. That is true.

Q. What was the occasion of your writing the letter of April the 11th, Commission's Exhibit No. 19-A and B?

A. Well, I think I just—

Q. (Interposing.) I want to know if it was not the Indiana bidding which was the occasion for it?

A. To my knowledge it was not the Indiana bidding. I did not associate the Indiana bidding with this at all.

Q. Then what was the occasion for your writing those letters?

A. My occasion for writing that letter was because they established a lower base price, a base price at our mill lower than we could get right around in our own backyard, and I thought it was not necessary.

Q. Well, what I am asking is why you thought the Bay City base was established in your own backyard?

987 A. It is right down there.

Q. I say, why did you think the Bay City base was established? The reasons behind its establishment?

A. I don't know.

Q. You did not have any thought on it even at that time?

A. I did not know why it was done.

Q. You merely wrote a letter as a protest—

A. (Interposing.) You see—please get this right. I have been faced with a loss over the past five years of $700,000 in business, and I wanted to see if we could not build up something in the way of having my people what I considered was our definite good marketing plans.

Q. And your definite good marketing plans, you thought should be exactly the same as your competitors?

A. Our good marketing plans were those figures that I decided upon ourselves. Needless to say that we cannot get any more than anybody else, and needless to say we should go right along on that line.

Q. But you could get and you sometimes did get less than other people? Wasn't that what all the trouble was about?

A. The $700,000 is all the trouble on that, sure.

Q. Plenty of other people were having trouble along during those years, too, weren't they?

A. Well, I don't know about their headaches.

Q. I thought everybody knew that business gener-
988 ally had a headache during that period?

A. Any one man has got all his own headaches to take care of.

Q. Is that why you said in this letter to Mr. Lingeman October, 1933, Commission's Exhibit 20-B, "We agreed that any time whenever we are going to enter a new territory, we would carefully survey and look over that territory to find out what procedure should be followed, what the customs were in that particular territory, in order that we might not knowingly tear down any price structure." Is that the reason you wrote what I have just read?

A. The reason that sounds a little ambiguous in a way—when I say "we agreed"—when I talked that way, it was—please get this in your mind that I do not have the correct phraseology and expression as you expert lawyers do, so I sometimes make a blunder, but what I mean there

is that we, Johnson, Lingeman and Cree and the Aetna Portland Cement Company agree to do so and so between ourselves.

Q. Well, didn't you write this letter as a record of what took place at that meeting?

A. I did. And they were there.

Q. You said, "It seems to me the results of that conference should be a matter of record."

A. Yes.

Q. Then you go on to specify them under several numbers?

989 A. Yes, sir.

Q. And number 5 was just what I read?

A. Yes, sir.

Q. So then—

A. (Interposing.) We—Lingeman, Cree and myself agreed to that.

Q. At this meeting?

A. Yes, sir.

Q. And you go on to say, "Summing it all up, I pledged my word and the word of the Aetna Cement Company that we would play the game 100 percent, and there would be no deviations from this in any way. We will be regular in quotations." What did you mean by "being regular in quotations?"

A. Quoting our regular printed published price of the Aetna Portland Cement Company.

Q. I think it has been testified here by your sales manager that you did not have any regular published price for the Aetna Cement Company?

A. Well, I am inclined to think the sales manager did not have any, but I tried to have them.

Q. I see. You mean then you really did not have any? The company did not have any although you wanted one?

A. They told me they had one, and I have been trying to impress upon them the necessity of living up to
990 the law, living up to that letter—

Q. (Interposing.) Living up to what law?

A. The law of fair dealing by quoting on their own prices as they did, and not quoting one day one price to a man and another day another price from the same concern on the same price list.

Q. Is it your testimony that your subordinates there

were quoting different and varying prices from day to day between different customers?

A. I don't know.

Q. Wasn't this $700,000 loss that you referred to—didn't you have quite a surplus against which that was offset?

A. Well, yes, we had a surplus, but that does not make any difference with your $700,000 loss. It was there just the same and it was growing each year.

Q. Didn't you have a surplus in the beginning of the depression that was nearly $2,000,000?

A. I don't remember; I cannot tell you.

Q. $1,800,000, or something like that?

A. I would not dare to say. I don't remember the figures.

Q. Well, this $700,000 loss during the depression years was offset and reduced your surplus that much, I take it?

A. Sure.

Q. Was that surplus, whatever it was, built up during the regime and under the management of Mr. Lingeman and Mr. Cree?

991 A. I think it was.

Q. I am now showing you Commission's Exhibit 22-A, B, and C. Do those bring to your mind any of the circumstances that were occurring about that time?

A. Yes, there was a meeting at the Book-Cadillac Hotel.

Q. Attended by you?

A. I was there.

Q. Who else was there?

A. Well, many others. Lingeman was unable to be there, as I remember it, because he was ill. Mr. Cree was there, and others, quoting on the question—talking over the question of costs. This again comes in during the day of the code proposition.

Q. October, 1933?

A. Yes, sir.

Q. Who were the others who were present?

A. I don't know.

Q. You cannot name one?

A. Mr. Rooney was there of Huron, and who the others were I don't know.

Q. Can you name any others?

A. No, I cannot. That was five years ago—four years ago, and I cannot tell you.

Q. Well, approximately how many attended the meeting?

A. I cannot tell you that. I don't know, sir. I
992 would if I could.

Q. Well, you have named four including yourself. Can you say whether there were six altogether or ten altogether?

A. No, I named Cree and myself and Mr. Rooney.

Q. Lingeman?

A. Lingeman was not there.

Q. All right; three.

A. I cannot tell you the others; I don't know.

Q. You cannot say whether there was six people there altogether or eight or ten people there altogether?

A. I don't know. There may have been six and there may have been eight. I don't know.

Q. Rooney is the only competitor's representative that you remember?

A. That is the only one. I presume there were others, but I don't know who they were.

Q. Well, Commission's Exhibit 22-B which is a memorandum of that Book-Cadillac meeting, says that the meeting "was composed of the prominent carload shippers, and also those interested prominently in the trucking of cement." Does that help you to state who was present?

A. No, I don't know, sir.

Q. You don't even know who the prominent carload shippers were?

A. No, sir.

993 Q. You don't know who those interested prominently in trucking cement were?

A. I cannot tell you.

Q. Did you make a proposal at that meeting to change the Aetna Company policy with regard to the trucking of cement?

A. That proposal as I remember it, was written by Cree. He handed it to me to read, and I said, "That sounds pretty good, Cree; I think I will read that and let's see if we can get some common ground on this trucking situation." Now, I called it my baby, but I think that the thing was really written by him, for this reason,—I was not enough in touch with the details of trucking or any of those things to sit down and draft out a trucking plan for the State of Michigan. It would be idiotic for me to

do it, and I think he drew that up and I said, "O. K., let's read that and see how it hits."

Q. According to Commission's Exhibit 22-B, being a memo of that meeting, it says: "Mr. Rooney opposed a certain proposition made by you and says he is in favor of his New York and Ohio plan which works out satisfactorily, namely,"—and then he describes it. Can you state at this time what his New York and Ohio plan was?

A. I cannot.

Q. The memo goes on to say, "As it stands at this writing, three o'clock P. M., October 24, 1933, it is left for F. R. Johnson and the Aetna Company to decide
994 whether they will agree with all the others in the Rooney plan or not." Does that accord with your recollection of the situation?

A. I should suspect that that was correct.

Q. Did you later agree to make your trucking policy the same as that which Mr. Rooney had proposed as the New York and Ohio plan?

A. No, and I think that this whole thing went by the board and never went through. That is as I have been informed.

Q. According to Commission's Exhibit 22-C, Mr. Lingeman advised you by letter November 1, 1933, that Rooney of Huron had phoned that morning and made an appointment for the discussion of your proposal?

A. Yes.

Q. That is the 5-cent differential. Did you have a discussion with Mr. Rooney about the 5-cent differential?

A. I did not.

Q. Mr. Lingeman says he volunteered the information to Rooney that you were writing Mr. Stroh a nice letter. Did you write Mr. Stroh about this trucking matter?

A. I don't know.

Q. Was he present at that Book-Cadillac meeting on trucking?

A. Mr. Stroh?

Q. Yes.

A. No.

Q. Anybody there from Wabash?

995 A. I don't know.

Q. According to Commission's Exhibit 22-A, you gave instructions to the Detroit office. You said you still felt the plan offered by F. R. J. at the meeting on October 24th, was feasible and workable?

A. Yes.

Q. (Reading.) "But we realized there were some difficulties as to saying when the 10-cent additional should be charged."

A. That is right.

Q. Is that your message to the Detroit office?

A. Which one?

Q. The paper, Commission's Exhibit 22-A, that page (indicating)?

A. I should say yes.

Q. According to the same exhibit, "When going into Wisconsin, we suggest that you work in accordance with the Petoskey cement sales plan which seems to be good." What was the Petoskey plan?

A. I don't know.

Q. You said also in this memorandum, "Say to Mr. Rooney if we should decide to discontinue the plan which we have approved of and say now we will work with, we will give you notice that we are going to discontinue. Please make this clear." Do you know whether or not 996 that was passed on to Mr. Rooney?

A. I don't know.

Q. Showing you now Commission's Exhibit No. 34, do you recognize that as a memorandum describing a meeting in Boston?

A. Yes, sir.

Q. The date being October 25, 1935?

A. Yes, sir.

Q. Who was present at that meeting?

A. Mr. Conkrite; I think Mr. J. B. Johns, I believe.

Q. Any one else?

A. No, sir.

Q. Did you invite them to come there to see you?

A. I did not.

Q. What did they have to say when they arrived?

A. Well, that I cannot tell you. We got to talking.

Q. Can you give us the substance of your conversation with them?

A. I will give you the substance if you will let me take that please.

Q. (Handing paper to witness.)

A. Let me say please, that it is not an unusual thing for a representative of the Universal Atlas or any other cement concern who was good enough to come down to Bos-

tor, to run in and see me, and I did talk to them. Conkrite had done it before and Mr. Johns had done it before.
997 So it was not an unusual thing for men to come into the office and talk to me.

Q. Did you ever have a call from Mr. Stone?

A. I have.

Q. All right, go ahead.

A. While we were there, I was talking to them and they wer talking to me about the question of the northern peninsula, and I said, "We are shipping goods up there by boat, and I am very much disturbed over our whole warehouse proposition. I have my doubts as to the feasibility of it; I believe it is a money-losing game, and I believe we are not right."

Q. Did you volunteer that without their undertaking to show you wherein it was not good policy?

A. Yes, I volunteered that myself, because that thing was uppermost in my mind.

Q. You already had your mind made up on it?

A. I had it in my mind and I had not my mind made up on it, but it was in my mind. My mind was made up later on. Conkrite said they had shipped by rail and it was more profitable. Having all of this loss staring me in the face, I said, "We will ship up there by rail, and that is the way we are going to go." That was the thing. And I said, whenever we have warehouses—you have read it there.

Q. Who said that?

998 A. I said that you read it. Do you want me to read that?

Q. Not out loud. Anything to refresh your mind on.

A. It was all in there, Mr. Wooden, in my mind, what was wrong with my company, why weren't we making some money? Gracious Peter, we were losing right along all the while. We were.

Q. This is your memorandum, I take it (indicating)?

A. Yes, sir.

Q. And you said in it, "At the meeting today it was considered to be to the best interests of all concerned."

A. Yes, sir.

Q. "That Aetna should continue distribution." Whom did you have in mind there besides Aetna among the phrase, "all parties concerned?"

A. Well, to be perfectly frank with you there, I had it

in my mind more especially the concerns who were doing business up there in that locality.

Q. Who were they?

A. I don't know. I knew Universal Atlas was one. Someone else might have been on there.

Q. Mr. Conkrite was the Universal Atlas man, wasn't he?

A. Yes, he was. If we went up there and distributed cement and we had been distributing it, I found out afterwards through our warehouses, in a way that was detrimental to our own health and our own vitality and
999 our own profit, then I thought we had better cut it out, and that is what we did.

Q. You say further in this Exhibit 34, "In shipping cement into the Upper Peninsula, it should go in carload lots."

A. Yes, sir.

Q. (Reading.) "And no truck deliveries to be made."

A. I did.

Q. Was any one objecting to your truck deliveries up there?

A. God, I was the worst objector.

Q. Was any one else objecting?

A. No, I cannot say that there were. I think Conkrite said, "We do not see how you can make any money shipping it that way, but perhaps you can."

Q. It was discussed at that meeting, at any rate?

A. It was.

Q. You said further, "All of this seems to be a step necessary for better harmony and better understanding."

A. Yes, sir.

Q. Better harmony with your competitors?

A. No, sir, better harmony between my organization and an understanding with me and a harmony to me, and by God, they were out of step on the harmony game.

Q. Wherein did you consider the trucking of cement in the Upper Peninsula was detrimental to the Aetna Company?

A. Because I felt, although I could not prove it, that the thing was costing us more than we were getting out of it.

1000 Q. You mean, you were, without knowing whether or not it was detrimental, you were proceeding to act on the assumption that it was detrimental?

A. I was unable to get any definite answers out of Cree or my office as to what the actual costs were, and I could not figure it out in my own way how that could be beneficial to us financially.

Q. You mean the cost of truck delivery?

A. The cost of getting it up there by boat and trucking it over to the consignee.

Q. All right. Just for a moment confine yourself to the truck delivery.

A. All right.

Q. What cost did that represent to the Aetna Company?

A. I don't know.

Q. As a matter of fact, was not the cost of delivery by truck less than that delivery by all-rail?

A. There in the Peninsula?

Q. Yes.

A. I don't know. I should say not.

Q. Did you have any discussion with your competitors as to the relative costs of delivery by truck and the cost of delivery by rail?

A. No.

Q. Was it ever brought to your attention by any
1001 one that the cost of delivery by truck was less than that by rail?

A. No. It would not naturally be. I would not be in touch with those things.

Q. Was it ever brought to your attention by any one that delivery by truck interfered in any way with the maintenance of a destination price based on the rail cost?

A. No. I am out of that touch entirely, sir.

Q. Referring again to Commission's Exhibit 34, did Mr. Conkrite have a copy of that?

A. I think he did; and Mr. Lingeman did.

Q. You furnished Mr. Conkrite a copy of it as of the day it was prepared, would you say?

1002 A. I do not know whether it was during that day or later, I can not tell you.

Q. Were you aware at the time that Mr. Conkrite had a conversation over the telephone with Mr. Cree about this memo?

A. I was not.

Q. Did you ever see this paper before, Exhibit 35-A, B and C?

A. My counsel showed that to me last night.

Q. Is that the first you ever knew of it?

A. Yes, sir.

Q. I am now showing you Commission's Exhibit 42-A, B and C, will you state where and when you had seen that before, if you have?

A. I think my counsel showed that to me last night. I do not remember seeing it before.

Q. Showing you Exhibit 41-B, would you say that this paper, Exhibit 42-A, B and C is one of the memoranda that was forwarded to Mr. Lingeman on November 29, 1935?

A. I could not tell you, sir; I do not know.

Q. Did you or did you not forward to the Detroit office the papers Exhibits 42-A, B and C?

A. What are 42-A, B and C?

Q. The ones you have right there (indicating).

A. I do not know. I may have done it, but I do not call it to mind.

1003 Q. Did some representative of some competitor hand that paper to you or send it to you, the paper which is marked Commission's Exhibit 42-A, B and C?

A. Well, I do not know of anybody handing it to me. Whether somebody sent it to me and I sent it right on—

Q. How is that?

A. I say whether somebody sent it to me and I sent it right on, I do not know. I may have done so.

Q. Are you familiar with the contents of it?

A. I am not.

Q. And the matters referred to there do not strike any responsive chord in your memory?

A. No, sir, it does not strike any responsive chord in my memory, neither does it come into my category of thinking about the coment company along those lines.

Q. Showing you now papers marked Commission's Exhibit 42-D to S, do you remember seeing those papers before?

A. I think I have.

Q. Where and when?

A. I do not know when. I believe those were sent to me to my office.

Q. By whom?

A. I do not know. I wish I could tell you, but I do not know.

Q. Were they sent to you along with this Ex-
1004 hibit 42-A, B and C?

A. They may have been, sir; I do not know; I can not tell you.

Q. Will you look at 42-A, B and C and ascertain whether or not those papers do not refer to and describe the transactions which appear in 42-D to S, inclusive?

A. I should say they did.

Q. Now do you recall having some competitor bring to your attention instances in Michigan where Aetna dealers were going out of their territory, and other instances where Aetna dealers were quoting the Government an f. o.b. mill price instead of a destination price?

A. I can not answer that; I do not remember.

Q. Did you have a discussion with Mr. Fred Stone of the Universal Atlas Company about these matters?

A. I do not know whether I did or not; I can not remember. I do not think—I do not know—I would rather not say. I do not know, I just do not know.

Q. Do you remember having an interview, or an interview being had with you by a Mr. Parker representing the Federal Trade Commission last June?

A. I do.

Q. Did you or did you not tell Mr. Parker that this exhibit, 42-A, B and C, was either handed to you or sent to you by Mr. Stone?

1005 A. I do not remember of saying that to him. If Mr. Parker said I did I presume he is a truthful gentleman and probably I did, but I do not remember.

Q. If he were to testify that you so stated at that time you would not question him?

A. I do not think I should, no.

Q. Did you ever ask Mr. Stone to put in writing any complaints of this sort that he had made orally?

A. No, sir, I never asked him.

Q. Did you ever make a statement to Mr. Parker, representing the Federal Trade Commission, that Mr. Stone had made such oral statements and that you had asked him to put them in writing?

A. No, I do not remember saying that.

Q. And there again it is a case of lack of memory rather than positive denial?

A. Absolutely. I am not positive; I do not remember.

Q. If Mr. Parker should testify that you so stated to him would you then dispute it?

A. I do not think I would if he said I said so. I think Parker is straight and square.

Q. I show you now Commission's Exhibit 44-A and B; do you remember that?

A. Yes, sir.

Q. It has been identified here and I believe the
1006 memorandum itself shows that you read that at a meeting in Chicago.

A. I did, sir.

Q. Do you remember who was present?

A. No, I can not tell you who was present, not from this (indicating). I think there is something in some letter that you have here, but I can not tell you.

Q. Why did you undertake to prepare and read a statement like this to your competitors?

Examiner Norwood: What exhibit is that?

Mr. Wooden: This is Commission's Exhibit 44-A and B.

A. My reason for doing that was that in my opinion, to my knowledge, we had been losing this $700,000, which is a lot of money. My feeling towards my people got to a point where I felt uncertain as to what they were going to do, and I felt that it was incumbent upon me to denote to the trade generally, as well as to my people, what our policies were, not what they were going to be but what they were at that time.

By Mr. Wooden:

Q. Well, you said in this Commission's Exhibit 44-B, "It is our intention to sell cement in any field which we may desire to go into."

A. Yes, sir.

Q. "But in doing so again we will maintain the general market price."

1007 A. Yes, sir.

Q. Do you consider that a statement that did not have any application to the future?

A. Its only application to the future was that we were not going to lower our general market price and we were going to hold to it. Just because the field was up then and they thought they would need a lot of tonnage they got worried over this great question of tonnage, tonnage, tonnage and tonnage. It was the thing which we were going to go on and follow our own established price.

Q. As a matter of fact your tonnage was disproportion-

ate to the capacity of your plant compared with the tonnage of other people, other competitors, was it not?

A. Well, I do not know as I am going to discuss that, sir, but I know they were talking about tonnage all the time.

A. Cree and Lingeman.

Q. Did not your competitors ever talk about tonnage?

A. Not to me.

Q. They never objected to the tonnage you were getting?

A. I have never had an objection.

Examiner Norwood: We will take a ten minutes recess.

(Whereupon a short recess was taken.)

Examiner Norwood: Go ahead, gentlemen.

1008 By Mr. Wooden:

Q. Referring again to Commission's Exhibit 34, this memorandum dated October 25, 1935, did you personally write that memorandum or prepare it?

A. I did.

Q. Now coming back to Commission's Exhibit 44-A and B, this statement of your policies read at the December, 1935, meeting, it is stated "We have agreed that in shipping cement into the Upper Peninsula it should go in carload lots and no truck deliveries should be made."

A. Yes, sir.

Q. "See our filing dated November 5, 1935." What filing do you refer to there?

A. I can not tell you except there was a filing that was put out at that time, something that the—well, it is dangerous to guess, I can not tell you.

Q. Was it customary to file such matters with the Cement Institute?

A. That I do not know. Those details were taken care of by the general manager.

Q. Is that what you referred to when you said "See our filing of November 5"?

A. I do not know. I would answer you if I could, but I do not know.

Q. Referring to Commission's Exhibit 45-A, B
1009 and C, do you recognize that as a copy of a communication of yours to Mr. Lingeman, I believe?

A. Yes, sir.

Q. What was the situation in Cleveland that you instructed Mr. Lingeman to see J. B. John about?

A. It was about the question of warehousing. I have had, as you can see by that letter, I have had my views as to warehousing and the efficiency of warehouse work. I felt skeptical all along and I had asked J. B. John what he knew about warehousing, and he went on to tell me about that, and I told Mr. Lingeman and Cree to go and see John, to see about the warehousing situation.

Q. Were you warehousing there through some dealer in Cleveland?

A. It was through somebody, I do not know the name naw, I can not tell you.

Q. Was that warehouse eliminated?

A. It was.

Q. You said here, about the Port Huron, "See Mr. Russell and get that straightened out." What was that?

A. Mr. Russell had had experience on warehousing up in Port Huron, and he was located in Port Huron, and I told them to find out from him what his experience was on warehousing.

Q. Who was Mr. Russell?

A. He was connected with the Peerless—

1010 Q. The Peerless Portland Cement Company?

A. The Peerless Portland Cement Company.

Q. You told him to see what he could do in Grand Haven and Toledo that would be satisfactory?

A. Yes, sir.

Q. That it might be wise to withdraw from both places?

A. Yes, sir.

Q. Was any withdrawal carried through there?

A. At the present time we have withdrawn all except, I think, two or possibly three. Is that right, Mr.—

Examiner Norwood: Just a minute.

The Witness: I beg your pardon. All except two.

By Mr. Wooden:

Q. And where are they?

A. One in Menominee, at Mr. Smith's place, and the other I think is—well, I do not know, it is either Grand Haven or Port Huron, I do not know. They are all discontinued except two or three. Our results have been very unsatisfactory.

Q. Have you discontinued your contract with Mr. Smith?

A. No, sir.

Q. I am carrying you back now to February, 1935, as indicated by Exhibit 25-A, B, and C. That is your signature to that document, is it (indicating)?

A. It is.

Q. It is the paragraph on Commission's Exhibit 1011 25-B that I am referring to, reading as follows:

"The last meeting I had with Mr. Crapo and Mr. Rooney was to the effect that Mr. Rooney and Mr. Lingeman were going to get together and lay out some plan of disposing of our goods which will be fair and just and satisfactory to both. Beyond that I have not heard a word."

Will you explain what that relates to?

A. I think that the word "disposing" is the wrong word that should be used in there, I think it should have been distributing." We were talking over then, as I remember it, the distribution of goods by truck. That is the best information I can give you, sir.

Q. You think that is what that relates to?

A. I think so.

Q. Truck distribution?

A. I think so.

Q. On the occasion that led to the discharge of Mr Cree as salesmanager, did he ask you to come out to Detroit?

A. No, sir.

Q. He has so testified. Do you want to take issue with that?

A. That is not so.

Q. How did you happen to go out there?

A. I went out there owing to the fact that Mr. 1012 Lingeman had been on East at a meeting and he was taken ill,—

Q. What kind of a meeting was that?

A. A meeting in my office, of my board of directors.

Q. All right.

A. He was taken ill, and his wife was with him, he had a very serious nosebleed. She telephoned for a doctor, asked me to get one. I sent this doctor of mine there to stop the nosebleed and to look him over, and he said, "That man is to me a very sick man." Then later I came out to Boston—or to Detroit and saw Mr. Lingeman, and to my knowledge I did not let Cree know that I was coming, although he might have known, the office might have known that I was coming.

Q. Before you went out there on that occasion had you learned anything of a controversy over whether or not Aetna should sell to the Indiana Farm Bureau?

A. No, sir.

Q. Had you ever heard of any controversy prior to that time over whether Aetna should sell to the Indiana Farm Bureau?

A. Yes, sir, there was a question raised in New York, at the spring meeting, I should say, of 1936—

Q. Spring meeting of what?

A. The Portland Cement Association.

Q. Do you mean the association as distinguished from the Institute?

1013 A. Yes, sir.

Q. All right. Were you present?

A. I was present.

Q. Who raised the question?

A. Lingeman and Cree were with me, and Cree says—I don't know—well, I said to Cree, or Cree said to me, "I want to see Mr. Hogan about the Farm Bureau situation."

Q. All right, go ahead.

A. And, as I remember it, I do not think Mr. Hogan spoke to me first about it, but he might; at any rate, I took Cree and Lingeman to see Mr. Hogan regarding the Farm Bureau situation, and they talked about it about five minutes, and Mr. Hogan explained to him who were legitimate dealers, as he saw it, but, he said, "I am not in touch with that whole thing and I would advise you to see Pearson, our representative in Indiana," and Cree piped up and he says, "Do you mean to say we can not sell certain people in Indiana?" He says, "Absolutely not. You can sell anybody that you want to, only see Pearson and he will tell you what we figure are real good distributors down there and who are not." So I said, "Go and see Pearson." That is my recollection of it.

Q. Well, on arriving at Detroit in the summer of 1936 did you then learn that there was some controversy over whether you should sell the Indiana Farm Bureau at
1014 certain points in Indiana?

A. I do not remember anything about it.

Q. Did you issue any instructions in the summer of 1936 as to whether or not your company should or should not sell the Indiana Farm Bureau?

A. I do not remember of anything of that kind, sir.

Q. And you do not recall that anything relating to that was up during the summer of 1936, following the Portland Cement Association meeting?

A. No, I do not. I would like to again make this plain to you, sir, that I did not get into those details; that was supposed to be left to the General Manager, that was his job and not mine. I could not get into those details.

Q. And yet you had this prior talk with Mr. Hogan about the Indiana Farm Bureau?

A. Yes, while we were all together, yes, sir.

Q. Was there any objection made by any competitor to your selling the Indiana Farm Bureau?

A. Not that I know of.

Q. Was that ever brought to your attention by your Detroit manager, or salesmanager?

A. The complaints from somebody else?

Q. Yes.

A. I do not remember that it was.

Q. When you came out to Detroit on that occa-
1015 sion, just before Mr. Cree was discharged, did you talk to any representatives of the competitors?

A. Not to my knowledge. I do not think I saw one.

Q. Were you in and around Detroit for several days before you discharged Mr. Cree?

A. Well, I do not know, but I do not think so. My memory serves that I left my place in Boston on a Sunday and got there on Monday and went to see Mr. Lingeman on a Monday. The time has gone by so I can not tell you, sir. That is my impression.

Q. Did you have any talks with the competitors' representatives after you discharged Mr. Cree?

A. What talks do you mean?

Q. I mean on the occasion you were in Detroit at that time and that you did discharge him?

A. I think I said to Mr. Rooney that Mr. Lingeman had resigned for ill health; and Mr. Cree had likewise—we dispensed with his services. Now I think he is the only one that I told. I do not know. That is all I can remember.

Q. Did you put pressure on Mr. Lingeman to resign?

A. I told him that I thought it was wise for him to resign. Do you want to know why or don't you?

Q. Why? I assume on account of his health.

A. On account of his ill health. He was in bad shape,

he was a wreck. He had been ill for two years. He
1016 had been away a great deal. I had felt that he could not carry on, and so I talked to him, I told him what I thought was the thing to do and I thought the nicest thing to do was to resign, and he accepted gracefully and did resign.

Q. Gracefully and willingly, without any protest or objection?

A. He said, "I will do anything that you ask me to do."

Q. Why did you think it of enough importance to tell Mr. Rooney about your having dispensed with the services of those two gentlemen?

A. Well, he and Lingeman had always been more or less intimate, and I spoke to him just the same as I would pass the day with you.

Q. Did you have a communication about that time, in the summer of 1936, from Mr. Crapo of the Huron Company?

A. Not that I know of.

Q. When you say "Not that I know of" you mean not that you remember?

A. Not that I remember.

Q. With regard to these warehouses which you discontinued, were not those warehouses merely dealers through whom you made sales on a pay-as-you-go basis?

A. I can not answer that. I do not know the details of how that was accomplished.

Q. You are not able then to explain now wherein
1017 those warehouses were unprofitable?

No, except when I saw my trial balance at the end of the year and I saw so much money charged up to the cost of warehouses I questioned their value, and it represented a loss.

Q. Well, if these were dealers handling your product I do not understand just wherein their costs would show up on your books.

A. They had to be paid so much a barrel for all the cement going through their warehouses, according to the arrangements that were made.

Q. Well, that simply affected the price that you got from them, did it not?

A. It affected the profit of the business, sure.

Q. Naturally whatever profit there is would be in the price?

A. Had to pay them so much.

Q. Yes.

A. And sometimes those warehouses people were very unsatisfactory men to do business with and I feel that they cut the price and caused a general disturbance with our other customers.

Q. Sometimes they got out of their territory into other dealers' territory?

A. Well, not so much that, but they had a good friend and they would do him a favor by letting him divide 1018 some of their commission with him.

Q. You took counsel, did you not, with competitors as to whether the warehousing of cement in that manner was a good policy or not?

A. I did.

Q. Referring back for a moment to this Portland Cement Association meeting where you discussed the Indiana Farm Bureau matter with Mr. Hogan, did any discussions take place at such a meeting regarding your trucking, the matter of trucking?

A. Not that I remember.

Mr. Wooden: I ask to have these marked Commission's Exhibits 91-A and B, and Commission's Exhibit 92.

(The documents referred to were marked for identification "Commission's Exhibits 91-A and B," and "Commission's Exhibit 92.")

By Mr. Wooden:

The witness identified Com. Ex. 91A and B and 1019 Com. Ex. 92 as photostats of correspondence taking place between the Cement Institute and him relating to his proposed resignation.

Mr. Wooden: I offer that for the record, with the statement that they came from the files of the Institute. The originals from which those were made came from the files of the Institute.

Mr. Leisure: No objection, your Honor.

(COM. EX. 91-A and B, and 92, were offered and received in evidence.)

By Mr. Wooden:

Q. According to an exhibit you have seen this afternoon, Commission's Exhibit 44-A and B, your statement of policies dated December 6, 1935, you were giving assurances to your competitors as to what your future policy

would be, while on the 19th of December you were seeking to resign from the Institute. Why were you seeking to resign?

A. I felt at that time that we could no longer—we no longer needed the Institute. I felt that we could get along without it. We were losing money, and I was anxious to cut down our expenses, and so I decided to resign, 1020 but I found out afterwards that my dues continued on for a year.

Q. Did you make your resignation effective later?

A. No. I am not sure of that, sir, whether it automatically ran out or not, but there was certain information which was gathered at that Cement Institute which our present general manager wanted to have, wanted to be able to have the access to, such as the filing of freight rates and things of that kind.

Q. Mr. Calvin, you mean?

A. Yes, sir.

Q. And does that mean that on his request you continued your membership in the Institute?

A. Yes, sir.

Q. So that your resignation never actually became effective?

A. That is right.

Q. Do you know, Mr. Johnson, why freight rate information from the Institute was so important to Mr. Calvin?

A. I do not.

Q. Did Mr. Calvin ever discuss with you the theory of the basing point system?

A. No, sir, and I don't want to have him.

Q. I am showing you a paper—we can mark it for identification, if you like—from Mr. Calvin to Mr. Reiter, October 20, 1936. Is that Mr. Calvin's signature 1021 (indicating)?

A. Yes.

Q. Directing your attention to the first paragraph, will you again say that Mr. Calvin never discussed the basing point system with you?

A. Referring to that first paragraph, I will say no. If he did, I did not get it.

Mr. Wooden: I will ask that that be given a number and then I will offer it for the record.

(The document was marked "Commission's Exhibit 93 for identification.")

Mr. Wooden: I offer this Commission's Exhibit 93 for identification for the record.

Mr. Leisure: This is a photostat, Mr. Wooden. Where does it come from?

Mr. Wooden: Out of the Institute's files.

Mr. Leisure: No objection.

(COM. EX. 93 was offered and received in evidence.)

Q. Do you understand anything about the basing point system?

A. I do not.

1022 Q. Was it nevertheless your wish and policy to have your company operate according to it?

A. That was a thing that was left for the general manager to operate the business,—that was a part of his job.

Q. Was that true also of Mr. Lingeman and Mr. Cree, too?

A. It certainly was part of their job.

Q. Did you pay to the Institute dues that were classed sometimes as General and sometimes as Special?

A. What did you say?

Q. Did you pay to the Institute dues that were sometimes classed as General and sometimes as Special?

A. I think so. I don't know definitely.

Q. You do know what the Special dues were for?

A. I cannot tell you now.

Q. Did you pay dues separately calculated for the Chicago office of the Institute?

A. I don't know.

Mr. Wooden: I ask to have these papers marked Commission's Exhibit 94 for identification, and Commission's Exhibit 95-A, B, and C for identification.

(The papers were marked "Commission's Exhibit 94 and 95-A, B, and C, respectively for identification.")

By Mr. Wooden:

Q. Showing you papers marked Commission's Exhibit 94, and 95-A, B, and C, can you state where those papers came from?

1023 A. Well, do you say I received these papers?

Q. No, I did not say anything. I asked you if you can say where they came from?

A. I should say they came from the Cement Institute.

Q. Did Mr. Parker when he called on you in June, obtain certain papers from your files and if so were those among them?

A. I don't know, I am sure.

Q. Have you seen those papers before?

A. As a rule, that class of stuff I pass right on over to the Detroit office or the Bay City office. I may have seen them. I don't know, but I have seen so much of that sort of literature that I cannot tell you.

Mr. Wooden: For the information of counsel, these are photostats of documents in Mr. Johnson's files. They are regular circulars of the Institute and numerous copies have been found in various places, so I will offer them at this time. I offer Commission's Exhibits 94 and 95-A, B, and C.

Mr. Leisure: No objection.

(COM. EX. 94 and 95-A, B, and C, respectively, were offered and received in evidence.)

1025 Washington, D. C.,
Wednesday, December 15, 1937.

1026 F. R. JOHNSON resumed the stand as a witness on behalf of the Commission and testified further as follows:

Direct Examination by Mr. Wooden.

1026-27 The witness identified Com. Ex. 96 A and B as a letter dated March, 1937, from Mr. Calvin describing to him the general situation of labor troubles and strikes in and about Detroit and what bearing those strikes might have upon the demand for cement.

1027 Mr. Wooden: I offer Commission's Exhibit 96-A and B for identification for the record, explaining that if it were not that 96-A were a part of the same communication as 96-B I would not care to offer 96-A.

(The documents were handed to counsel for the respondents.)

Mr. Leisure: Are you offering it, Mr. Wooden?

Mr. Wooden: Yes; I am.

Mr. Leisure: No objection.

(COM. EX. 96-A and 96-B was offered and received in evidence.)

By Mr. Wooden:

Q. In this communication of March 23, 1937, Mr. Calvin tells you that on March 15 the price of cement at Ironton, Ohio, was increased 10 cents a barrel and it would have been increased more if the Toledo base
1028 had gone up. Do you know why the Toledo base did not go up?

A. I do not.

Q. He states there that the Cape Girardeau base went up from $1.80 to $1.95. Was that out of the territory of the Aetna Company?

A. I do not know.

Q. You do not know whether the Cape Girardeau base affected your prices?

A. I do not, sir. I am not in touch with the question of basing and locations.

Q. He said further "There is a very decided movement on foot for the raising of the base at Buffington, Indiana, beyond the LaSalle Mills and a general increase throughout the Middle West." Do you know whether any such increase took place?

A. I do not.

Q. Further he says, "You will recall that these people are at least 30 or 40 cents above us now. There is no indication of any price change in Michigan." Has there been any price change in Michigan since that time?

A. Since when?

Q. March, 1937.

A. I think there has.

Q. What kind of a change?

A. I think there was a reduction, I believe.

Q. Since March?

1029 A. I think so.

Q. Even though the Michigan price was, according to Mr. Calvin, 30 or 40 cents below that in the territory south, south and west?

A. The Michigan price was lower?

Q. Yes.

A. The Michigan price was lower.

Q. How do you account for such a large difference in the price as 30 and 40 cents between the Michigan prices and the prices in the States south and west?

A. I really wish I can tell you. I do not know.

Q. Do you know whether the Aetna Company has gone

into that high price territory with the same base price that it was using in Michigan?

A. I do not know.

Q. If you did go into that territory where the prices were 30 or 40 cents higher what would be your policy? Would it be to make the same price that was there existing?

A. We should probably meet the market price.

Q. That would have been in line with your policy, as stated to your competitors, and that is when you went into a new territory you would not break down the price structure there?

A. That would be true. We wanted to get all the profit we could. We were getting little enough and we were showing a loss.

1030 Q. That would make all the difference between profit and loss, to get the business at that 30 or 40 cents higher price, would it not?

A. It would have made the difference between profit and loss.

Q. Even if you had cut the price in that territory by 1 cent a barrel you still would have had a pretty good margin, would you not?

A. We need not talk about that, because that is what we should not do. God knows we needed the money, but we would not cut the price.

The witness identified Com. Ex. 97A, B and C as a letter from Mr. Calvin asking him to find out what Mr. Hogan of Lone State figures is the average cost of selling
1031 cement. The witness said that Mr. Calvin had a high regard for Mr. Hogan's ability and that Mr. Calvin thought Mr. Hogan could supply that information.

Mr. Wooden: I offer these papers Commission's Exhibits 97-A, B and C.

Mr. Leisure: No objection.

(COM. EX. 97-A, B and C was offered and received in evidence.)

1032 Q. What did you understand Mr. Calvin to mean in his statement on page 2 that "We are now merchandising our cement according to the ethics of the industry"?

A. Well, that is a thing which Calvin could explain better than I.

Q. I want your understanding, that is all.

A. All right. My understanding is that he is getting into his costs and his selling prices, or his selling costs are all the things that are necessary, which would be a thing which would be more or less done by all of the other cement companies and would be a matter of common knowledge.

Q. Is that a matter of ethics?

A. Well, I do not know whether you would call it ethics or common knowledge.

Q. Well, he speaks of it in this way: "Now merchandising our cement according to the ethics of the industry."

A. Well, I think he would consider that ethics or common knowledge.

Q. Is that the only explanation you can offer?

A. That is all I can offer.

Q. Was there some difference between your merchandising policy at that time and what it had been prior to that time, with regard to the ethics as you have explained it?

A. He was trying to find out what the general selling costs were.

1033 Q. Were you considering using the general selling cost instead of your own?

A. That I do not know. I do not know what he would do. He was looking for information to find out what the general custom was.

Q. What particular elements of cost were involved in the ethics, as he refers to them?

A. I do not know.

Q. Did you consider some of these matters you discussed with your competitors, about your selling policy, did they involve ethics of the industry?

A. I did not consider it from that point of view. I did not consider it at all. He asked me if I could arrange to get him the information and I said I would try to do it.

Q. I am referring now to your meetings with competitors at which you—did not you state, in substance to them, you wanted to do what was fair and right, from a competitive standpoint? Did not that involve a matter of ethics?

A. I said that we wanted to carry on our own price structure in our own way, and we were going to adhere to our published list of prices, and we did not intend to

deviate from that list price. We always held the right to make up our own price list, whatever we felt it should be. Naturally we wanted to get as much as we could for our cement, and naturally we do not want to sell cement
1034 any lower than we have to. We sell it low enough, low enough. When I have a picture before me of a loss of $700,000 I know darn well we sell it low enough.

Q. Do you know whether or not you had published price lists during the time that Mr. Cree and Mr. Lingeman were managing the business?

A. My dear sir, they were told to have a price list, but whether they did God only knows and I do not.

Q. All right. Now that matter of $700,000 loss that you referred to—

A. Yes, sir.

Q. —down to what time do you figure it?

A. For the five years back of 1936.

Q. Exclusive of 1936?

A. Yes. We are in 1937 now. Yes, exclusive of 1936. That is my memory. I may be wrong on that.

Q. What was you showing in 1936?

A. I think we made a little money. That was right after Mr. Calvin had come in, in August, 1936.

Q. Your fiscal year, I believe, runs from April?

A. That is right.

Q. Part of that showing during 1936, from April until August, was under the regime of Mr. Cree and Mr. Lingeman, was it not?

A. It was.

1035 Q. What is the present state of your surplus?

A. How much surplus?

Q. Yes.

A. I do not know. I haven't the figures before me. I can not tell you, sir.

Q. Well, a few years ago it was about $1,800,000, was it not?

A. I think $1,600,000 or $1,800,000, somewhere in there. I do not know. I can not remember that.

Q. You say you still have a surplus of approximately $1,000,000?

A. I should say so.

1036 The Witness: May I finish this?

By Mr. Wooden:

Q. I don't care; go ahead.

A. You realize, sir, that with a surplus, although it may

be a million dollars, we cannot keep drawing on that surplus all the while. By and by we get down to bad cash situation.

Q. That is rather obvious.

A. I think so.

Q. Do you happen to know whether or not some of the most powerful and wealthy corporations in the country also saw great inroads into their surplus during the depression years?

A. You mean in all companies all over the country?

Q. Yes. Take United States Steel and some of the biggest companies.

A. I suppose they all did.

Q. Many companies had their surplus completely wiped out, didn't they?

A. I don't know. I have seen something of that kind in the paper.

Q. That is a matter of common knowledge, isn't it?

A. I think so.

Q. Will you state whether or not the Aetna Company has written off in the form of depreciation and obsolescence and depletion, its entire investment in plants?

1037 A. It has not.

Q. Over a period of time?

A. It has not. We have written off what the government allows us to write off.

Q. Over a period of how long?

A. Many years.

Q. Has not the total of that over a period of many years been the equivalent or more than the entire investment in the plant?

A. What do you mean by the entire investment?

Q. You are capitalized for $500,000?

A. Yes.

Q. Well, I understand that is what the original total capital investment has been.

A. And you ask if the depreciation over a period of years has not been $500,000?

Q. Yes.

A. I think it has.

Examiner Norwood: Is that written off depreciation?

The Witness: Sir?

Examiner Norwood: Do you mean written off depreciation?

The Witness: That is depreciation.

Examiner Norwood: That has been written off?

1038 The Witness: Written off.

By Mr. Wooden:

Q. And are you still writing off depreciation?

A. We follow the depreciation, my dear sir, just exactly as the United States Government tell us we must follow year by year.

Q. My question is are you still writing off depreciation?

A. I am still saying to you, sir—I don't know just what you are driving at, but I am telling you that we depreciate each year in accordance—on our books—in accordance with what the government specifies.

Q. I think you know what I am driving at.

A. Well, I do not.

Examiner Norwood: Well, as a matter of fact, what does that amount to?

The Witness: How much a year?

Examiner Norwood: Yes.

The Witness: That I don't know; I cannot tell. I have not the books, Your Honor.

By Mr. Wooden:

Q. Doesn't the Government say that you can continue to write it off and not that you must continue to write it off?

A. Well, you have got to ask somebody higher up on law than I am, but I think that we—or at least my understanding is—you have got to write it off.

1039 Q. Even though the entire investment had been previously written off over a number of years?

A. There you get to a point that I don't know. You are going to get into a technicality that I am not going to argue because I don't know.

Q. Is it or is it not a fact that the continuation of your policy of writing off depreciation expense accounts in part for the losses of $700,000 that you have talked about?

A. Not altogether, no, sir.

Q. In part, I said.

A. I would want to look at my audit report before I—

Q. (Interposing.) I am not asking you how much: I say, "in part."

A. All right. I am not going to say that, sir, until I see my books and know.

Q. If I am not mistaken, you have already said it.

A. I have? All right, then.

Q. Would you be willing to submit for the record, an auditor's statement that would permit an analysis and an answer to the questions I have asked?

A. Well, I should think that would be a matter for counsel to decide on, sir.

Mr. Leisure: I think it will be very simple to get those figures for Mr. Wooden, and we will be very glad to supply them for him.

1040 Mr. Wooden: All right.

Mr. Leisure: And while you are talking about it, I would like to suggest that you do not write off capital assets in that way. What you really write off is costs of plants, and you do not write off capitalization of your stock.

Mr. Wooden: I appreciate that. It is a matter of terminology.

Examiner Norwood: Off the record—

(Discussion off the record.)

Mr. MacIntyre: Off the record—

(Discussion off the record.)

By Mr. Wooden:

Q. Were the prices of Aetna cement increased during 1936?

A. I don't know.

Q. Do you have any personal knowledge about Mr. Calvin's statement in Exhibit 97-C that Aetna's sales expense is lower than the average for the industry?

A. I have no personal knowledge of it.

Mr. Wooden: I ask to have this paper marked Commission's Exhibit 98 for identification.

(The paper was marked "Commission's Exhibit 98 for identification.")

By Mr. Wooden:

Q. Showing you a paper marked Commission's
1041 Exhibit 98 for identification, what is that? (Handing paper to witness.)

A. (Witness examining paper) This is a letter from Calvin to me. I had asked what "G. & A. expenses"

were; what he meant by G. & A., and he goes on to describe the G. & A.

Mr. Wooden: I offer it for the record.

Mr. Leisure: No objection.

(COM. EX. 98 was offered and received in evidence.)

By Mr. Wooden:

Q. Is that the first time that you learned that G. & A. in the industry means "General and Administrative"?

A. That was the explanation of that term which I asked for. I did not know what he meant and I asked, and there is the answer.

Q. Were you aware prior to that time that it was the custom in the industry to reduce everything to a barrel basis?

A. My knowledge simply was on a barrel basis. Whether it was the custom or not, at least that was my language. Whether that was the language of all, I do not know, because I am not always in touch with their language. I do not always perhaps speak their language as we speak many other languages, and so that was my idea.

Mr. Wooden: I ask to have these papers marked Commission's Exhibit 99-A, B, C and D for identification.

1042

(The papers were marked "Commission's Exhibit 99-A, B, C and D for identification.")

By Mr. Wooden:

Q. I now show you papers marked Commission's Exhibit 99-A, B, C and D for identification. Will you state what they are? (Handing papers to witness).

A. (Examining papers). Well, without going through and reading this altogether and delaying you, and the copies are so very very poor and difficult for me to read, this is a letter which I wrote to Mr. Hogan. (Indicating).

Q. You mean that is a copy of it?

A. Excuse me; this is a copy of a letter which Mr. Parker took from my files in Boston of a letter to Mr. Hogan asking him about these same things for general information which Mr. Calvin asked me for.

Q. That is Exhibit 99-A, B and C?

A. Exhibit 99-A, B and C.

Q. What is 99-D?

A. 99-D is Mr. Hogan's reply to me which you have

read, no doubt, and in which he said if I would see him some time in New York—

Q. (Interposing) You do not have to give the contents.

A. Which I have never done.

Mr. Wooden: I offer Exhibit 99-A to D, inclusive, 1043 for the record.

Mr. Leisure: No objection.

Examiner Norwood: Received as Commission's Exhibit 99-A, B, C, and D.

(COM. EX 99-A, B, C, and D was offered and received in evidence.)

By Mr. Wooden:

Q. Now, I notice that in your communication to Mr. Hogan, you used the same expression regarding ethics of the industry that Mr. Calvin had used in his communication to you, is that correct?

A. If it is in there, I did. I practically copied Calvin's letter and sent it along to him. If he used the word "ethics" I probably used that same word so as to speak the language of the street.

Q. You said something about your understanding of the ethics of the industry with regard to the inclusion of certain items in cost, is that right?

A. I think I said that there were certain definite items that had to go into cost.

Q. As a matter of ethics?

A. Well, I don't know as about a matter of ethics. As a matter of business. You may call it ethics or you may call it what you like.

Or business ethics?

1044 A. Or business ethics.

Q. I just want to get what was in your mind.

A. My mind was to get everything into cost; let's find out what the whole darned costs were. You may call it ethics or call it anything you like; it is the same rose just the same.

Q. I am not trying to call it anything. I am trying to find out why you used the term "ethics" for something such as including all proper items of cost?

A. Well, I cannot tell you why I used that particular word "ethics." My mind was to get all things together.

Q. Were you any more familiar with the ethics of the industry than you were with some of these matters such

as G. & A. expense and the reduction of all computations to a barrel basis?

A. Acquainted with it?

Q. Yes.

A. No, sir.

Q. You say here in this paragraph on the second page of Exhibit 99-B: "Our merchandising in the past as I study it over has been very chaotic. We had only three salesmen. Now we are merchandising our cement according to the ethics of the industry, and we have put on several new green men." What was the connection between merchandising according to the ethics of the industry
1045 and putting on several new green men?

A. Just ask that question again, please.

Examiner Norwood: Read it.

(The question is read.)

The Witness: My only answer to that would be this, that we were putting on more men and we were covering the trade more as the general cement industry and others were covering it, and instead of doing it with three men, we were putting on more. You can call that ethics or custom.

By Mr. Wooden:

Q. Does that mean that it took more salesmen to handle the business according to the ethics of the industry than it did when you were not handling it according to the ethics of the industry?

A. We felt it took more salesmen to handle the selling end of our business in better shape than had been done before.

Examiner Norwood: Did it enable you to go into a wider territory?

The Witness: Not particularly that, sir, but gave us an opportunity more frequently of calling upon our trade constantly instead of once in three months or six months, but more frequently.

By Mr. Wooden:

Q. Do you know whether or not the increases in
1046 your sales force resulted in a lowering or an increase of your cost per barrel of selling?

A. I cannot tell you that, sir.

Q. I understand you to say that you never had this in-

ference with Mr. Hogan which was the subject of this exchange of correspondence?

A. No, sir.

Q. Mr. Hogan invited you to call upon him with regard to it, didn't he?

A. He did. But I could not get to New York at the time and had not been down there to see him. I did not make a special trip to go to see him, but if I was there, I would go and call on him.

Q. Did you have any further communications with him either oral or written?

A. About this?

Q. Yes.

A. No, sir.

Mr. Wooden: I ask to have these papers marked Commission's Exhibit 100-A and B for identification.

(The papers were marked "Commission's Exhibit 100-A and B for identification.")

The witness identified Com. Ex. 100A and B as 1047 a letter dated May 27, 1937 from Mr. Calvin to him.

Mr. Wooden: I offer Commission's Exhibit 100-A and B for identification for the record.

Mr. Leisure: May I just ask a question? Is this also one of the letters you turned over to Mr. Parker?

The Witness: I don't know, Mr. Leisure. Does it say so there?

Mr. Wooden: I think it is so stamped.

The Witness: All right, then I did.

Mr. Leisure: No objection.

Examiner Norwood: Received as Commission's Exhibit 100-A and B.

(COM EX. 100-A and B was offered and received in evidence.)

By Mr. Wooden:

Q. This communication refers to a letter of Mr. Stroh's to you and a reply you made to Mr. Stroh. What Mr. Stroh is that?

A. Mr. Bernard Stroh, Junior.

Q. What is his connection?

A. Stockholder—his father's estate is a stockholder.

1048 Q. In the Aetna Company?

A. In the Aetna Company.

Q. Is he connected with any other cement company?
A. Not that I know of,—no sir. I don't think he is.
Q. Was Mr. Stroh's letter and your reply available at the time that Mr. Parker obtained this copy of Mr. Calvin's letter to you?
A. I doubt if it was. I think I sent the whole thing on to Calvin.
Q. Mr. Calvin says, "From Mr. Stroh's letter, I rather gain the impression that he thinks that I am God's gift from heaven." What did you understand from that?
A. I understand from that that he was very much impressed with Calvin and thought from what he could see of his general management there and of what he was planning to do, that he was a very superior man to what we have had.
Q. And in reference to his uncle's company, if Mr. Stroh's company "had gone along with the price increases, we should be getting at least 30 cents a barrel more in Michigan than we are getting, and perhaps 10 cents more in Ohio than we are getting." What was Mr. Stroh's uncle's company?
A. The Wabash Company.
Q. Do I understand, Mr. Johnson, that the increased sales force that you put on after Mr. Cree's discharge covered the same selling territory that was formerly
1049 covered only in a more intensive fashion?
A. I think Calvin can answer that question better than I. My opinion, I think it was to cover the whole Michigan territory more thoroughly.
Q. What do you mean by the Michigan territory?
A. I mean, Michigan territory; the State of Michigan.
Q. The State of Michigan?
A. Yes, sir.
Q. Your salesmen did not go down into Indiana?
A. Yes, we had one salesman in Indiana.
Q. Covering how much of Indiana?
A. I don't know.
Q. With the price of cement down in that territory 30 or 40 cents a barrel higher, why didn't you put more salesmen down in that territtory?
A. Well, I don't know.
1050 Q. Mr. Johnson, will you submit for use in the record the letter from Mr. Bernard Stroh to you and your reply to him that is referred to in this last numbered exhibit?

A. Well, I will if I have it.

Q. Well, will you take steps to get it from Mr. Calvin if you do not have it?

A. I will try to see if we can find it. I will say this much, it is just purely a personal letter addressed to me regarding the general business of the Aetna Company, and I told him to go and see Calvin at one time when I was in Detroit. I got this letter and I sent it on to Calvin. I said, "You probably will see him and give him every attention," something like that. It was just a personal letter.

Q. Yet it related to the affairs and business of the Aetna Company?

A. Yes, because he had been asking about the Aetna Company. He had been disturbed because we were losing money, we were disturbed because we were paying no dividends, like many others, and he had asked me, because he was one of the trustees of that estate.

Q. What was your policy at your Boston office with reference to preserving in your files letters and copies of your outgoing letters on Aetna Company business?

A. I just preserved what I called my active file. Inactive things I did not preserve. I had my active file.

1051 Q. And you had not preserved there any of the papers which have gone in evidence here from Mr. Cree's files?

A. Well, I do not know. There are so many letters that have gone in from his file that I do not know.

Q. Perhaps I should make one exception to that.

A. I should doubt very much, because after I had sent them word to do a certain thing then they told me they were doing it, why, I called that inactive.

Q. I understand that one of your disagreements with the management of Mr. Lingeman and Mr. Cree in your company was over the matter of continuing this warehouse distribution?

A. Yes.

Q. Along the Lake ports.

A. Yes, sir, I was disturbed about that.

Q. Were you aware that the Huron Company was using that same system and has continued to use it when you discontinued it?

A. If I was aware of it it made no difference to my thoughts. I was stared with a loss at one time, as I saw

it, on my audit report of I think about $180,000 for warehousing expense and I was disturbed by it.

Q. Did you ever go into the matter with the Huron Company?

A. No, sir.

Q. You went into the matter with those who disagreed with the wisdom of the policy and did not discuss it
1052 with an outstanding company that did use the same policy?

A. I did not discuss it with the Huron Company.

Q. Mr. Johnson, calling your attention to Commission's Exhibit 20-A, it being a portion of your letter to Mr. Lingeman, dated October 3, 1933, giving instructions along the lines of what you had stated to a conference with certain competitors. Under No. 3 you stated, "It was stated that the other cement concerns could never find out definitely just what we were doing when they called us by telephone, and that our answers were evasive. My answer to this was, 'We will tell them at all times how much a particular contract is for and we are perfectly willing to tell them if they inquire at what price we took the order. Moreover I stated if we were in doubt or not clear what was going on, that we sensed any trouble in the market, we would not hesitate to call in Mr. Rooney or Mr. Lucks or Mr. John or Mr. Jennings, or anyone else, and ask them about the situation, in order that we might know and not unintentionally tear down the situation.' They stated that they would answer those questions promptly and freely, and we will do the same."

1053 Did you consider it a proper business policy for competitors to acquaint each other in that way, with the intimate details of each other's business?

A. I consider it perfectly proper for any one manufacturer to call up a brother manufacturer, or he may be a competitor, probably, and say, "Did you sell this or that in this particular market at a particular price? We have heard that you did. Now if that is true we would like to know it, and if it is not we would like to know it, because then, of course, if it is sold at a lower figure we will have to meet it."

Q. In other words, you have to meet it—strike that out. Go ahead.

A. (Continuing) "If you did not then it is a salesman's loose talk and I shall pay no attention to it."

Q. Does your reply extend to competitors informing each other in advance what their prices are going to be?

A. No, sir, absolutely not.

Q. Did you have the discharge of Mr. Cree, your salesmanager, in mind for a considerable time before it actually occurred, or was it a somewhat sudden decision on your part?

A. Well, what do you mean by a "considerable time"?

Q. Well, you can define it in any way you like.

A. All right. I had Mr. Cree's discharge in mind along in the middle or the latter part of July.

1054 Q. What year?

A. 1936.

Q. Is that the first time you had it in mind?

A. No, I thought of him myself, that if he did not change his tactics I would have to get a new salesmanager.

Q. And over how long a period of time were you considering him in that line?

A. Well, I do not know, I can not tell you.

Q. Well, was it a year or six months, or what?

A. Well, I do not know. I was disturbed with him. He was evasive, he was not right in his doings with me, things did not go right, there were a lot of things which caused me to lose confidence in him.

Q. Did not you write him on one occasion that you were not going to be swept off your feet by complaints of competitors when he and Oscar were not around?

A. I certainly did.

Q. When you first began to think of discharging Mr. Cree did you have his successor in mind or did you give consideration to who might be his successor?

A. No, I did not.

Q. Was Mr. Calvin recommended by any of your competitors to be Mr. Cree's successor?

A. No, sir.

Q. Did anyone recommend him?

1055 A. Not that I know of.

Q. Who selected him?

A. I did.

Q. On what basis?

A. On the basis of what I had known of the gentleman, of his record as I had followed it. I had met him two or three times at various meetings of the Cement Association.

Q. Who introduced him?
A. I do not know.
Q. Was he introduced by some competitor?
A. I do not think so. I think I just went up and said, "Is this Calvin of Consolidated," or whatever his concern was. I do not think anyone introduced him. No one introduced him to me as a proper timbre as a general manager.
Q. Do you mean to say while you did not know enough about the details of the business to know the customs and practices of the industry that you had been following Mr. Calvin's record before you selected him, and you knew what his record was?
A. I was impressed with the way Calvin talked and the way he looked, and I inquired about him, I asked some questions as to his standing and that was told to me, that he was a good, clean, straight-shooter. He was admired by his competitors for being honest and straight-forward.
Q. Where did you get that information?
1056 A. Oh, I do not know. I picked it up from two or three different people. I can not tell you now who they are.
Q. Some of the concerns in the cement business?
A. I suspect some of them were in the cement business. Naturally they would be.
Q. Did Mr. Hogan ever say a good word to you in behalf of Mr. Calvin?
A. No, sir. On that point, in fact, when Mr. Calvin was appointed Mr. Hogan said, "Have you got a good man there?" I said, "I think so." He said, "I don't remember him. I would like to meet him sometime."
Q. In other words, Mr. Hogan did not know Mr. Calvin although Mr. Hogan is intimately acquainted with the cement business and you knew Mr. Calvin although you knew little about the cement business?
A. That is very true. One man can not know everybody.
Q. Did you give a dinner shortly following Mr. Cree's discharge at which you had representatives of competitors present?
A. No, sir.
Q. Did you have a meeting at which representatives of competitors were present?
A. And discuss Mr. Cree's discharge?

Q. I did not ask you that. Did you have a meeting with competitors shortly after Mr. Cree's discharge.

A. Not that I know of. I might have sat down
1057 to the table and people came in and sat down and joined me, something of that kind, but as far as having a well-laid-out dinner and asking competitors to come in, no.

Q. I did not ask you about a well-laid-out dinner.

A. All right. I did not arrange a dinner.

Q. Did you sit down to dinner with your competitors just after Mr. Cree was discharged?

A. Oh, I might have.

Q. Who was present?

A. I do not know.

Q. How many were present?

A. I do not know.

Q. Where was it held?

A. I do not know.

Q. Referring now to Commission's Exhibit 44-B, being a part of your statement read to a meeting of competitors and dated December 6, 1935, I call your attention to the language where you say, "We have agreed that in shipping cement into the Upper Peninsula it shall go in carload lots and no truck deliveries will be made. See our filing dated November 5, 1935." Did you file with the Cement Institute, along with your filing about the discontinuance of trucking in the Upper Peninsula, figures showing your base prices?

A. I presume they did. I do not know.

Mr. Leisure: If I am not mistaken we covered that
1058 exact question yesterday.

Mr. Wooden: I think you are mistaken.

By Mr. Wooden:

Q. Do you recall discussing that point with Mr. Parker when he interviewed you last June?

A. Yes, sir, he asked me what that filing was and I told him I could not tell him.

Q. Did you or did you not tell Mr. Parker that along with the filing about the discontinuance of trucking dated November 5, 1935, that you also filed the prevailing base prices to be followed by Aetna?

A. I do not remember of telling him that.

Q. If he were to testify that you did so tell him would you then dispute it?

A. Well, as I said to you yesterday, I think Mr. Parker would tell you correctly what I had said to him.

1059 Q. Did you discuss with Mr. Parker the matter of the dispute over your selling the Indiana Farm Bureau?

A. I don't remember that I did.

Q. There again, if Mr. Parker were to testify that you did discuss that matter with him, would you dispute it?

A. Again I would say that if Mr. Parker said that I did discuss it with him, I should think that Mr. Parker was probably correct.

Q. Do you remember at all what you said to Mr. Parker in relation to the sale of the Indiana Farm Bureau?

A. I do not recall.

Q. Do you recall whether or not that at that particular time in June, 1936, the matter of the sales to the Farm Bureau was rather an acute matter with the company?

A. No, I can not tell you that I do. As I testified yesterday, the question of the Farm Bureau was one that had come up and was more or less discussed with my people. I did not get into it in detail and I did not intend to.

Q. You testified, however, to have talked with Mr. Hogan about in May, 1936?

A. I did.

Q. At the Cement Association meeting?

A. I did. That was relative to the question of who should be the dealer.

1060 A. Be dealers; Farm Bureau dealers. And that question was taken up by Mr. Hogan and he advised them to see Mr. Pearson.

Q. Will you be specific now in stating in what way if any Mr. Cree's policies as general manager did not conform with the ethics of the industry?

A. I am not going to talk about the ethics of the industry, sir. Mr. Cree's policy did not follow in line with my idea of good merchandising. When we lay down a price to do merchandising in the Aetna Company, we should adhere to that one price to all of our customers, and not give a rebate to this one or a lower price to the other one in a secret way, because eventually when you do that, your whole house falls down and you have got to give it to everybody. Then when you give it to everybody, your competitors are going to say, "Well, there is a lower price," and they come on and meet it, and then,

as I have said before, that pricing system of Mr. Cree's was the most chaotic thing that you ever saw.

Q. I suppose you would say it was no system at all? That it was chaotic?

A. I certainly would.

Q. Weren't you aware of what the general policy of your subordinates was during those years?

A. I was anxious. I had felt that he was not following out my instructions. I felt that Lingeman could not
1061 control him; he would run out on his own hook. He would do as he liked, and then later on we would know something about what he did.

Q. You would hear from competitors about it?

A. What is that?

Q. You would hear about it from competitors?

A. Yes, and we heard about it ourselves in our own way, and when I would ask him a question, he was very evasive.

Q. Can you specify any particular instance?

A. What? When he was evasive?

Q. Yes.

A. Well, if I did, sir, it would fill a very large book.

Q. Can you give any specific instance?

A. No, I can not, only in a general way. I did not keep those sort of things. In a general way his answers were very evasive.

Q. As a matter of fact, didn't he write you in detail about these various things?

A. Once or twice he did write me in details.

Q. Oh, quite so often, wasn't it?

A. Well, accept it as that. At times he would write clearly, and other times he was off in a fog.

Q. You found your competitors rather critical of him, anyway?

A. Sir?

1062 Q. You found your competitors rather critical of him?

A. I did not ask my competitors, as a rule.

Q. You did not have to ask them, did you? They told you?

A. (Continuing.) About this or that.

Q. They told you without being asked, didn't they?

A. Sometimes they said to me, "We cannot understand why Aetna quotes such and such a price," and I said,

"Well, they quote their regular price," and they said, "No, they have quoted less."

Q. Did any of them ever express to you that they wondered why you kept a man like that?

A. No, sir. They probably thought it. They probably thought I was crazy.

Q. You got the idea that they thought so?

A. Well, I would have thought so if I had been them.

Mr. Wooden: All right; that is all.

Cross-Examination by Mr. Leisure.

Q. Mr. Johnson, while we are on that subject, there has been a great deal of talk in the record during the time that Mr. Cree was on the stand and while you have been on the stand about your competitors in connection with Mr. Cree's discharge. Will you just start in chronologically and tell His Honor in a connected way—did Mr. Lingeman go at or about the same time?

1063 A. Yes, sir.

Q. Just tell His Honor that situation and what happened?

A. In June, 1916,—in April, 1916, Mr. Lingeman came to Boston to see me and his wife was with him.

Q. You mean 1936, not 1916?

A. 1936, excuse me. And he was taken ill. His wife telephoned to me for a doctor, and I sent my doctor and said, "This man has got a nose bleed, stop it and look him over from head to foot; I want to know something about him." Because I had had my misgivings for a long time as to the health of this gentleman. He kept telling me that he was being checked up by a doctor, and he was all right and he was O. K., but my doctor checked him up, stopped his nose bleed, and the next day he said to me, "Mr. Johnson, if this man holds any important position in your organization, you should get another one right away." I said, "Why?" He said, "At the time that I made this examination, which was yesterday, he had a temperature, a slight temperature, he had a blood pressure of 250, he has hardening of the arteries and enlargement of the liver, and some kidney trouble. He is in a serious condition, and that man is no more fit to carry on business, if you try to drive him to business,

tell him he should come back, he is likely to die almost any moment."

Q. What did you decide to do, at that time if anything?

A. Well, first I got him home as soon as I could,
1064 and then I thought over as to what to do, and my doctor had told me that that man will never again be ready and equal for hard work; he cannot do it; his nervous condition is such, and he has got these complications, and he cannot go on. I then commenced to think around to find out what I should do. I had two men in mind; one was Mr. Calvin and another man. I talked with my associates and told them the story and I said, "We have got to get another general manager. Just what we will do with Mr. Lingeman, how we will arrange with him, is a matter for future consideration, but we must get another general manager."

Q. Did Mr. Cree's name come into those discussions with your business associates?

A. As the general manager? No, sir.

Q. Did his name come into the discussion in any way?

A. Yes. After I had spoken of Mr. Calvin, I said that I have lost all confidence in Cree, I do not believe he is temperamentally fitted to be a good business man, and I think from the results that I see, we have got to make a change there.

Q. What had caused you to lose your confidence? What was his relationship with the other men in his office at that time?

A. The whole office was jealous one of the other. He was of a jealous disposition.

1065 Q. When you say that Mr. Cree was jealous, what did you mean by that?

A. Well, I think he wanted Lingeman's job as general manager, and he was jealous of Lingeman.

Q. You say you lost confidence. What if anything had you observed as to Mr. Cree's regular attendance at his office in the last two years?

A. His regular attendance was very irregular. There were times when he was not there at all during certain days.

Q. What had you observed as to large telephone bills from his home?

A. The bills—his telephone bills were very large in-

deed, and I was stared with this expense and I was looking to cut down all expenses, and that telephone bill of his was extremely large, very large. He told me that he had arranged with his entire trade so that in that way he could do a great deal more work and not have men, they could call him up on long distance and reverse the charge.

Q. And doing business at his home?

A. Doing business at his home.

Q. What did you do; just go ahead and tell His Honor what you did after you had these talks in Boston? What if anything did you do with regard to this situation that had been called to your attention?

A. I went to Detroit. I called on a doctor who
1066 had also examined Mr. Lingeman, and he gave me also word for word the same diagnosis of the case as the man or the doctor did in Boston. He told me, he said, "Mr. Lingeman cannot work. He is just simply all used up for some reason or other." He said, "He seems to be frightfully nervous." Well, I said, "He has had several vacations, three months and two months at a time, and so forth. I cannot understand it." He said, "Well, he is in bad shape, and he can never do another week's hard work or even a day." I said, "Well, I wanted your report, because I am going out to see Mr. Lingeman—I am going to see Mr. Lingeman and I am going to talk over all of these matters with the probability of his resigning." I said, "I am going to have him into the office." He said, "Don't do that." He said, "That thing might strike him and he might die like that." (Snapping fingers.) "Go to his house."

I did. I talked it over with Mr. Lingeman. At first it was rather a shock to him. He realized it and he felt that perhaps that was the thing to do. He said to me, "I will sign anything that you ask me to, because I know that we have been together for many years and you have always been very good to me." "Well," I said, "here is a resignation as general manager and vice president."

Q. Was there any discussion at that time about his possible improvement in health and about his coming back to work?

1067 A. Yes, he said, "I am signing this—I cannot carry on at the present time and I am in hopes that perhaps some time later I may be able to come back and be of some help to the Aetna Company."

Q. Now, will you tell His Honor what your attitude was at that time and what you did with respect to Mr. Cree?

A. Either that same day or a day or two after—I don't know—I had Mr. Cree in my office. He came in and I told him I wanted to see him, and then I told Mr. Cree that for the best interests of the company, I felt it was necessary to dispense with his services.

Now, my reasons for that, sir, is the fact that he had given—the fact was that I had before me a loss of $700,000 in business, dollars and cents. He alone claimed to be the one man responsible for the merchandising of the product, and as such then he was responsible for this situation, because he had given these rebates, and those rebates were not known until the payments were made, when they were taken off from the bills as per agreement with Mr. Cree, and he had carried on this warehousing proposition where I had been very skeptical as to its good working and profit, that it was a profitable thing to do. And by these promises he would give—he did give anywhere from 10 to 30 cents a barrel to the people for handling the cement going through their place. That cement that those people, and in some cases they did,
1068 they could go and cut that price of our regular price of cement to one person or another, and eventually it came back on us and there was trouble, and then it became known that our price was lower, and it meant a further loss to us, because we were looking for profit. Any fool can give away business, but to sell it at a higher price, that is different.

Q. A moment ago when you said you discussed the problem of acquiring a new manager with your associates, did you mean your own business associates or did you mean competitors?

A. No, sir, I did not mean competitors at all. I never talked with a competitor about it.

Q. Now, Mr. Wooden asked you in one of his last questions to describe what practices Mr. Cree had indulged in which you considered were against the ethics of the profession. Did you consider his practice which you have just described of giving secret rebates by warehouses and using those warehouses really as salesmen, did you consider that as ethical practice?

A. No, sir.

Q. You mentioned the jealousy existing. Will you tell His Honor what your attitude of mind was about putting in a new manager with that situation existing?

A. Well, of course, everybody knows that not a single soul in this room would want to take the managers hip of a concern and have in there some material that was
1069 going to be disturbing and jealous.

Q. You felt that would not be the thing for you to do?

A. We could not afford to put that on any manager, whoever we selected there, because I was not going to hang that sort of stuff around a man's neck.

Q. To make it entirely clear to his Honor, was this just letting one man go, or did you have a complete shake-up and change your organization?

A. We changed this whole organization.

Q. You let your auditor go also within the next six months?

A. We did.

Q. His name was O'Neal?

A. Yes, sir.

Q. Do you let three men go?

A. I let three men go.

Q. At that time?

A. Yes, sir.

Q. I think you made a mistake about the year 1936 a moment ago. Will you refresh your recollection?

Mr. Leisure: I ask to have marked for identification a slip of paper running from 1932, taken from the books of the company, to 1937.

(The paper was marked "Respondents' Exhibit 16 for identification.")

By Mr. Leisure:

Q. Mr. Johnson, I show you Exhibit 16 for iden-
1070 tification, and ask you to refresh your recollection and tell his Honor what your losses were for the year 1932? (Handing paper to witness.)

Mr. Wooden: Your Honor, I want to interpose an objection there. It seems to me that any such statement, particularly concerning the witness' professed lack of knowledge about the details of his business, should be the statement of a certified public accountant, and not merely an offhand statement of the witness.

Mr. Leisure: Your Honor, I am going to ask for the

same courtesy there that I extended to government counsel. I am willing to have the government auditors go over our books and our balance sheets which we have here, and if there is one penny about that statement that is wrong, then I will allow that to be changed.

Examiner Norwood: You are asking this witness to testify to these figures here after his memory is refreshed from that paper. Has he had anything to do with that paper prior to this time? What is that paper?

Mr. Leisure: He had nothing to do with this paper, but he is familiar with the condition of his company during those years, and I submit that if any paper that I show him refreshes his recollection as to that condition, he can testify to it.

Examiner Norwood: He cannot refresh his recol-
1071 lection if he does not know those figures and never has known them.

The Witness: It is not a question of never knowing them.

Mr. Wooden: It is an extract from the audits. The paper, I add, cannot be admitted or received.

Mr. Leisure: I am not offering it.

Mr. Wooden: And the witness' statement based on those figures should not be received without first an opportunity to check the basis for the figures and considering the other items that may affect them as shown on the books and balance sheets of the company.

Examiner Norwood: You can go into that when you reply to it. The only question here is whether or not that is a paper that he is entitled to refresh his recollection from.

Mr. Wooden: If they will offer the balance sheets of the company that contain those items so that we can check them, I would have no objection.

Examiner Norwood: Did you ever know those exact figures at any time?

The Witness: I knew those exact figures at the end of every year when we had our public audit.

Examiner Norwood: And in looking at that paper,
does that refresh your recollection or can you
1072 testify to them because they are on the paper? Which is it?

The Witness: Well, there are two of them that I know definitely are in the audit. And I assume from that same

thing, the rest of them are, because those two are just what I have got in my mind.

Examiner Norwood: Which two of them are?

The Witness: This one of the loss for 1936 (indicating).

Examiner Norwood: What line is it on there?

The Witness: (Indicating.)

Examiner Norwood: And which other one?

The Witness: 1935. And this is 1937 (indicating).

Examiner Norwood: And you are assuming the others are correct because they are on the paper?

The Witness: Yes, sir.

Examiner Norwood: I will sustain the objection, that is, this witness will not be permitted to testify to any but those figures for 1935 and 1936. You can bring your bookkeeper and put those figures in.

Mr. Leisure: I was merely asking to at the proper time on cross-examination, to bring evidence from this witness as to his reasons for letting an unsatisfactory salesman go. It seems to me this is material.

Examiner Norwood: Well, if you are going to give those figures in as exact figures,—

1073 Mr. Leisure: We will put them in by an auditor if your Honor would rather have them done that way.

Examiner Norwood: Yes.

By Mr. Leisure:

Q. Will you look at 1936, which his Honor has directed you to look at, and tell us—

Mr. Wooden: (Interposing). Just a moment. I insist, your Honor, that the entire balance sheets be offered, and if they are offered, I will not have any objection.

Mr. Leisure: Your Honor, I have not every time counsel has picked out some papers, asked him to offer the entire record in evidence, and it does not seem to me that that is necessary. These balance sheets—this will become a public record, and I am willing to have the government see them, but I do not want to put in evidence unnecessarily, documentary evidence of that nature.

Examiner Norwood: I think so.

Mr. Wooden: Figures, particularly such as are now sought to be inserted in the record, are intimately and obviously affected, and their weight is determined by

their relation to other figures and the way the whole balance sheet is constructed.

Examiner Norwood: In the process of bringing 1074 these out, he can bring out the figures with regard to those two years from one witness, and then he can bring another witness with regard to the others, and so forth, and this witness if he remembers those, or if on looking at that paper it refreshes his recollection so that he can swear to them, he can swear to those two items only.

The objection is overruled as to them.

By Mr. Leisure:

Q. That is 1936 and 1937, Mr. Johnson. Will you state for the benefit of the record, what 1936 shows to be the losses?

Examiner Norwood: I think that was 1935 and 1936.

The Witness: 1935 and 1936. $107,697 and $122,051.

By Mr. Leisure:

Q. Those were losses, Mr. Johnson?

A. Those were losses.

Q. Do you know without looking at any paper at all, whether or not that situation had continued the year following that you reorganized your company?

A. That was changed, and it is very clear in my mind. We made $40,000 that year.

Q. The first year after the reorganization?

A. But I do know, your Honor, if you will pardon me, that I have had right along in my mind, a definite figure of a little over $700,000 that we lost. Now, I am not telling you each one, and if those figure up to $700,000, 1075 then it comes pretty near being right.

Q. Now, right along that line of what bears on the testimony this morning, when Mr. Wooden was asking you about the surplus of a million dollars; you do not want his Honor to sit there and have the impression that you are sitting there in Boston with a surplus of $1,600,000. Isn't it a fact that all of this surplus was ploughed back into plant which cost $2,500,000?

A. Absolutely.

Q. Isn't that a fact?

A. It is.

Q. And you have already told us, in addition you put in additional capital of between $300,000 and $400,000 to build the plants?

A. Yes, sir.

1076 Q. And that was borrowed money?

A. That was borrowed money, yes, sir.

Q. Now, while we are on that subject, just state what the position of your company was when you got your new manager, your cash position. Just what was it? How much money did you have, if you know?

A. Well, I am ashamed to say that we had mighty little money in the bank.

Q. How much?

A. Well, not over two or three thousand dollars.

Q. Did you have to borrow any money about that time to continue business?

A. Before that I borrowed $100,000 in Detroit to pay up a lot of old back bills, which I was ashamed of.

Q. After you paid up those how much did you still have left outstanding?

A. Well, that figure is rather clear in my mind, because I had to take those things up with Calvin when he came into operation there, and my impression is it was about $70,000 or $80,000 that we still owed.

Q. After you had borrowed the $100,000?

A. Yes, sir.

Q. So it would not be fair to leave it on the record that you had a surplus built up of earnings and were sitting there with $1,200,000 of capital, would it?

1077 A. No, sir.

Q. That is what I wanted to clear up.

A. We had exhausted our cash.

Q. Now as to this charging off of depreciation, you did not consider that you were doing anything improper in charging off depreciation every year, did you?

A. No, sir.

Q. Does it or does it not mean anything in your mind that finally the depreciation charged off amounted to as much as the original capitalization?

A. That does not register at all in my mind.

Q. That is a nominal capitalization anyway, is it not?

A. It is.

Q. Now another thing I want to clear up is about the stockholders. You do not want the Examiner to understand that this company is owned only by three people, do you?

A. No, no, not at all.

Q. You mentioned three principal stockholders.
A. Yes, sir.
Q. And the rest of the stock is held by the public, is that correct?
A. Yes, sir.
Q. About the time that you were considering getting rid of Lingeman and Cree over this period of years did the stockholders have anything to say to you about
1078 the absence of dividends?
A. I will say they did, and they were after me pretty hard, and I was ashamed of it, and I was sorry, and with the loss which we were getting, we were having right along over these whole five years, whether it is $700,000 or whatever it is, it was $700,000 or more, you can well imagine my feelings. I had been patient with Lingeman and Cree, I tried to make men out of them, but I was an awful failure at that job, and I had to make the change, sir, because—
Q. (Interrupting) Well, we have been over that, you have told us that.
A. All right, sir.
Q. Now you were asked yesterday by Mr. Wooden a question about the cost of trucking, and I think you may have misunderstood Mr. Wooden and you were talking about warehousing. Did you feel that this warehousing system, as carried on by Mr. Cree, was part of this trucking plan, that they worked together?
A. Yes, sir.
Q. Now was it the cost of trucking or the cost of warehousing that you were complaining about?
A. Well, it was the general cost of warehousing and trucking. With the warehousing proposition as we have it, and with the cement, it has to go from a carrier down onto another carrier and drop them some several feet,
1079 and then down to a boat, then on another carrier, then finally down into the hold of the boat. Now to prevent against having breakages and trouble of that kind, both at the loading end and the unloading end, it was necessary for us to buy and pay for bags which cost us more money than we ordinarily would have paid if we were shipping by car or truck.
Q. Did Mr. Cree discuss those things with you from time to time?
A. No, sir.

Q. When did you go into that matter as to the cost of those bags?

A. Well, Mr. Calvin came in as general manager—

Q. Then did you talk those things over with him? Did you take them up with him?

A. I took them up with Calvin. I said, "I want to know more about this. I have not been clear on this warehousing. I want to have you look into it and find out. I believe we are losing money."

Q. Had you discussed the method of doing business by warehouses with your competitors? I mean were you interested in finding out how your competitors made out by the so-called warehouse system?

A. I was interested, and I asked four or five or six. It is a matter of record there in one of those letters, in which I talked to these people and asked their advice as to
1080 what their experience had been as to warehousing, and their reply was, "We have tried it and we have found it very expensive and lost money by it."

Q. Now you have been in a number of different kinds of businesses and are interested in a number of different kinds of businesses than cement, as you have testified here. Is there anything unusual about your talking to competitors about problems of that kind, how they find them?

A. Not at all; never has been.

Q. Now on this question of your files that Mr. Wooden asked you about, Mr. Johnson, these files that Mr. Parker asked for, you did not mean that he took them, did you? You gave him all of these files when he asked for them?

A. I gave him those files. He took them. He said he wanted to take them and he took them with him and returned them.

Q. Now that brings to my attention that Crapo letter we have been asked to produce, a letter which Mr. Cree said on the stand that he saw that came from Mr. Crapo to you and that he gathered was criticizing him, and we have been asked to produce it. Have you such a letter?

A. I never saw such a letter.

Q. Did you ever receive a letter from Mr. Crapo criticizing Mr. Cree in any way?

A. No, sir, not that I know of. I never did.

1081. Q. Well, if you received such a letter you would know it, would you?

A. I would know it, yes, sir.

Mr. Wooden: May I interject? Notwithstanding the witness' testimony I want to reiterate the request for the production of the letter, in so far as it can be produced or accounted for by inquiry of the respective parties, whether it is available in their files or in any other way.

Mr. Leisure: Your Honor, if there is no such a letter in existence I do not know how we can produce it. Here is a witness who was supposed to have received it if it was written.

Examiner Norwood: The object of this notice is to give the respondents the opportunity of producing the letter. They have every opportunity to do so, and in fact, if they deny the existence of it, that covers the situation. The complainant may go ahead and prove there was such a letter and show the contents of it.

By Mr. Leisure:

Q. Did you show a copy of such a letter to Mr. Cree when you discharged him?

A. No, sir, absolutely not.

Q. Was the result of Mr. Cree's discharge in any way a suggestion from Mr. Crapo?

1082 A. No, sir. No suggestion from Mr. Crapo or any other competitor. It was my own decision, right or wrong.

Q. You were not discussing Mr. Crapo when you discharged Mr. Cree at all?

A. No, sir, I was not discussing with my competitor the management of my business. Darn it, I did it myself.

Q. You have already told us your understanding of the Indiana Farm Bureau episode and your talk with Mr. Cree and Mr. Hogan, I believe?

A. Yes, sir.

Q. Was it Mr. Hogan's suggestion that you talk to him about it, or did you seek out Mr. Hogan?

A. Mr. Cree said to me, "I would like to talk with Mr. Hogan regarding the Farm Bureau situation." Now whether Mr. Hogan had said anything prior to that I do not know, but the result was that Mr. Cree and Mr. Lingeman went with me and we talked with Mr. Hogan just before going into the meeting, and we had five minutes, as the result of that conference that occurred.

Q. Did that have to do with the Indiana Farm Bureau

episode? Did that have to do with prices or did it have to do with who should constitute the legitimate dealer?

A. It had to do with who was to constitute a legitimate dealer.

Q. And Mr. Hogan had suggested that if you wanted to know anything about it to talk to Mr. Pearson who
1083 did business in that country and who knew the dealers?

A. Absolutely, and Mr. Cree piped up and said, "Well, perhaps then you do not want to have me sell people down there." He says, "Well, you have got the whole world; go ahead. The markets are free. I am not saying not to sell anybody but just find out from Pearson what the understanding is as to who is the rightful dealer down there and who is not, and he can give you a lot of information."

Q. Well now, do you consider regular dealers an asset to your company?

A. I should say they were.

Q. There was some dispute down there about selling to everybody in a dealer's territory?

A. That was it.

Q. And you had put out a plan of your own in regard to what constituted legitimate dealers, had you not?

A. Yes. There was a plan published, or circulated around.

Q. You had your own ideas?

A. Yes.

Q. In your company as to what should constitute legitimate dealers?

A. The company had those ideas, yes, sir.

Q. And was not the real dispute about this situation down there whether or not you were conforming to your own plans of what a constituted dealer was?

1084 A. Absolutely, as I understood it.

Q. That is, you had come out with one plan to sell to legitimate dealers and you were selling to everybody, is that right?

A. That is right.

Q. Now Mr. Wooden was asking you about the warehouses that you had and was comparing them to Huron, that they continued after you discontinued using warehouses, that they continued using them. Do you know

whether or not their system was the same, whether or not they used bulk and used their own silos, or whether it was a very different system from the warehouse system you used?

A. As I understand the Huron system, they shipped their cement in bulk and conveyed it by their boat to these silos and from there they passed it out, and that is entirely different than a warehousing proposition.

Q. And did they own their own silos?

A. They did.

Q. That was different from your warehouse system?

A. Yes, sir.

Q. Any difference in the keeping of cement in bags in the warehouse or in the silo in bulk? Is there any breakage in the warehouse?

A. There is a great deal of breakage in the warehouse, and if it gets wet there is trouble.

1085 Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. Leisure:

Q. Now, Mr. Wooden asked you if there is any connection between putting in a group of salesmen and the ethics of the profession as indicated in Exhibit 99, "That we are in the process of developing a sales organization and in the process of getting new business." What was the difference between sending out salesmen and using these warehouses, as you have described, as far as the ethics of the indutry are concerned?

A. Well, as far as ethics is concerned I will say that—I do not know much about this word "ethics", but I will say as far as sending out salesmen, we had to send out salesmen to cover a field which had not been covered before thoroughly, as we saw it. When you have a warehouse proposition you can let the man who has the cement in his warehouse distribute that as he sees fit, and you can depend upon him largely, or they did try to depend upon him as a salesman. Therefore, in order to go out and get our trade, as I understand it, we had to put on more salesmen when we were closing up our warehouses.

Q. And in the use of the warehousing, did that involve secret rebates in any way? Is that what you were talking about?

A. I spoke of that, sir, and I think that they did.
1086 These warehouse keepers would cut the price and I found they did give a little extra discount.

Q. So what did you understand Mr. Calvin to mean when he told you he did not only discontinue the warehouses but he had taken on new salesmen, and he said, "We only had three salesmen and we are now merchandising our cement according to the ethics of the industry"?

A. I suppose he meant according to the plans which other concerns were using by having salesmen and not warehousing.

Q. And not granting secret rebates, is that right?

A. Not granting secret rebates, yes, sir.

1087 Mr. Leisure: Just go ahead and tell His Honor whether or not there were price cuts when those commissions were granted by the warehouse in that way.

The Witness: They were price cuts.

By Mr. Leisure:

Q. How?

A. Because the man who was running the warehouse had 10 or 20 cents a barrel for his pay, he could very easily and did in some cases give a man some cement and split his commission with him.

Mr. Wooden: In other words, they were cuts by the warehousemen and not cuts to the warehousemen?

The Witness: They were cuts by the warehousemen.

Mr. Wooden: By the warehousemen; all right.

By Mr. Leisure:

Q. When he had 20 or 30 or 40 cents off on a bar-
1088 rel, or at least 20 cents, would not you say that was a cut to the warehouseman for his commission?

A. If that cut his commission?

Q. Yes.

A. Sure it cut his commission, and it cut the price.

Q. And could he thereby undersell your dealer in that section?

A. He could undersell and did undersell our dealers, so I am very distinctly told, in those sections.

Mr. Wooden: Did you sell these warehouses on commission or did you sell them outright?

The Witness: Sir?

Mr. Wooden: Did you sell these warehouses on commission or did you sell them outright?

The Witness: Sir?

Mr. Wooden: Did you sell these warehouses on commission or did you sell them on an outright basis?

Mr. Zimmerman: Mr Cree has explained that.

Mr. Wooden: No, he is confusing the facts.

Examiner Norwood: Go ahead.

The Witness: That cement going to the warehouse was put in there and for every barrel that was sold he got a commission.

Mr. Wooden: Did not you say in some of your communications that it was not your property, that they owned it after they took it into their warehouse and you could not legally control what they did?

The Witness: I do not think I said that, sir. I
1089 think I said that to one of our customers who had cut our price, I said after we sold it to him it was his property.

Mr. Wooden: I will defer to the so-called redirect.

1090 By Mr. Leisure:

Q. Mr. Johnson, when Miss Fowley was on the stand, she testified, I believe, that she had received letters from Mr. Johnson which were marked "Please tear this up." What have you to say as to that if anything?

A. I sent no letters of that type, to tear them up.

Q. Did you ever write such a letter as that in your life?

A. No, sir. I don't do that in my business. That is not my business way of doing things.

Q. And these memorandums and Parker exhibits indicate that you did not follow this practice, isn't that so? I mean these Parker exhibits, the exhibits that you turned over to Mr. Parker?

A. That is so.

Q. Just one further question. In this letter that
1091 you received from Mr. Calvin date May 7, 1937, which Mr. Wooden questioned you about, and which has reference to now doing business according to the ethics of the industry, I think you have already said that some of these methods used by the warehousing method, was what you understood Mr. Calvin to mean?

A. It is, yes, sir.

Q. After you had this reorganization, were other facts

called to your attention that you did not know at the time they existed?

A. Yes, sir.

Q. Which further demonstrated you were correct?

A. Yes, sir. Many things after Calvin came in that he brought to my attention which I had not known before.

Q. You had general impressions which later became more specific?

A. Yes, sir.

Mr. Leisure: You may examine, Mr. Wooden.

Redirect Examination by Mr. Wooden.

Q. Can you say, Mr. Johnson, how much of the losses shown in 1935 and 1936 were offset by depreciation charges?

A. I can not, sir.

Q. Do I understand that you lost confidence in the men under whose regime your business had been built up 1092 to the extent of a surplus of nearly $2,000,000?

A. I lost confidence in those men whom I had out there or in Mr. Cree because I had realized in a general way—I had realized definitely that there was a total loss of over five years of $700,000. Now then, I had lost confidence in him. He lost my confidence because he could not carry out the instructions which I had asked to have done.

Q. Do you mean the instructions which you gave him regarding the relationships with his competitors?

A. No, sir. I gave him instructions and gave Mr. Lingeman instructions to be passed on to Mr. Cree that when we had a definite selling price and a policy, that we should adhere to that, and not to go playing fast with one and loose with the other.

Q. But you did give him instructions about his relationships with competitors?

A. Sir?

Q. You did give him instructions about his relationships with competitors?

A. I gave him instructions that we would work together, he and Lingeman and myself on the thing, and naturally he would follow the market price. I did not want to have him go out and cut prices, because we were losing money.

Q. And he failed to carry out the instructions as to his relationships with competitors?

1093 A. He failed to carry out my instructions, sir. I am leaving out the question of competitors.

Q. I am not. I am directing your attention to it.

A. All right, sir, but I am just telling you—

Q. (Interrupting.) Just answer my question.

Examiner Norwood: You can answer that question yes or no, can't you? Read it to him.

Mr. Wooden: I know that you would like to leave it out, but I do not want to leave it out.

Examiner Norwood: Those explanations have already gone in the record.

(The question is read.)

Mr. Leisure: I object to the question because it assumes that there was a relationship and an instruction as to competitors, and there has been no testimony from this witness that he was instructed to do anything with competitors. It is a double question, and I object to the question.

Mr. Wooden: Why, Your Honor, the record is full of documents written by this witness which he acknowledges having written, containing such instructions.

Mr. Leisure: If you separate it and ask him two questions, I will have no objection.

Examiner Norwood: I think he can answer anyway whether or not he was motivated in the matter be-

1094 cause Cree failed to carry out your instructions in maintaining relationships with competitors. You can answer that question. Was that part of the reason?

The Witness: Well, I don't want to answer it that way.

By Mr. Wooden:

Q. You can answer that. That is a very plain question.

Mr. Leisure: If Your Honor please, it seems to me that the fact should be established first as to whether or not he received any instructions at all as to competitors; and not have a question which assumes that he did have, and then ask him if he did it. It is just like the "Have you stopped beating your wife?"

Mr. Wooden: He asked him to initial his letter showing that they had received such instructions.

The Witness: I would like to make this statement, Mr. Wooden, that at no time and no place and nowhere have I given instructions to the Aetna Company to go to work and talk to competitors as to what they were going to do. At no time.

By Mr. Wooden:

Q. Well, we will let the record speak for the kind of instructions you did give.

A. All right, sir.

Q. But I would like to have you answer the pre-
1095 siding examiner's question which you said you did not want to answer.

Examiner Norwood: Either answer that or state that you can not.

The Witness: What is that, sir?

Examiner Norwood: Either answer that or state that you can not answer that one way or the other.

Mr. Wooden: He did not say he could not; he said he did not want to.

Examiner Norwood: Read the question again.

(The question is read as follows: "And he failed to carry out instructions as to his relationships with competitors?")

By Mr. Wooden:

Q. The question is, was that part of the reason?

A. Part of the reason for what, sir?

Q. Discharging Mr. Cree.

A. No, sir.

Q. All right; you have answered the question, even though you said you did not want to.

A. All right.

Q. I should have thought you would have been very glad to answer it in that way without hesitation.

Mr. Leisure: Now, if Your Honor please, I think it is clear on the record that he did not answer not because he did not want to but because he could not understand
1096 the question.

Mr. Wooden: The record will show.

Mr. Leisure: Yes, the record will show.

By Mr. Wooden:

Q. Now, on your cross-examination you talked about Mr. Cree's large phone bills at his house.

A. Yes, sir.

Q. He was carrying on company business there, wasn't he?

A. He was.

Q. Didn't that show to you that Mr. Cree was putting in a lot of time away from the office on company business, overtime?

A. It showed to me, sir, that he was using the telephone as an easier means of doing business rather than going out for it.

Q. Well, do not a lot of companies use the telephone for such purposes?

A. I presume they do, but that was my impression of those telephone calls.

Q. Coming back to the matter of losses during the years beginning in 1930, or was it 1931, and running down through 1936, do you think that all companies that showed losses during that period should have discharged their management under which the losses occurred?

1097 Mr. Wooden: Well, he has testified, Your Honor, that he discharged this management because they showed losses during that period, and he made out that that was the only reason—he tries to, and I am asking him therefore that question, which is a very pertinent question under those conditions.

Examiner Norwood: I think he can answer it.

The Witness: I am to answer that question?

Examiner Norwood: Yes.

The Witness: Will you ask it again, please?

(The question is read.)

The Witness: Not unless they had good and sufficient reasons.

By Mr. Wooden:

Q. In addition to the losses?

A. You asked if I thought they should discharge the management.

Q. Under which losses occurred.

A. Not unless they had good and sufficient reasons.

Q. Other than the losses themselves.

A. Other than the losses themselves.

1098 Q. You spoke about the incident wherein Mr. Lingeman had his nosebleed. Can you fix the time of that?

A. I think it was June 17.

Q. What year?

A. 1936.

Q. How can you fix the date so accurately as that?

A. Well, I will tell you why. In Boston we have a Patriots Day there June 17, and I was going to take him for a ride down through Cape Cod, and he was taken ill that day.

Q. You testified on cross-examination that you discharged O'Neal, your auditor, at the same time you discharged Mr. Cree.

Mr. Leisure: No, that is not the testimony, if the Court pleases. I put the question and I did not put it in that way.

Mr. Wooden: That is the way I understood your answer.

By Mr. Wooden:

Q. Will you clarify the facts on that?

A. Mr. O'Neal was discharged later.

Q. How much later?

A. Well, I don't know; I think it is three or six months; I am not sure. It was a later time.

Q. Did you hold Mr. O'Neal partly responsible for some of the disobedience to your policies that you 1099 had called upon your management to observe?

A. I agreed with the general manager when he told me that he felt that it was going to be wise to let O'Neal go—

Q. (Interrupting.) That is Mr. Calvin you are referring to?

A. Yes, sir. Then he told me why, that there was a disrupted condition there, and I said, "All right, because I think we have got to clear the decks for you."

Q. Was Mr. O'Neal mixed up in any way with the dispute over the sales to the Indiana Farm Bureau in the summer of 1936?

A. I don't know, sir; he may have been; I don't know.

Q. Did you discuss with Mr. Parker representing the Commission, the matter of Mr. O'Neal's connection with the Indiana Farm Bureau matter?

A. I don't remember that I did.

Q. Did you say to Mr. Parker or not that Mr. O'Neal had made mistakes in connection with shipments made out to that Indiana Farm Bureau?

A. I can not remember that. I should be inclined to think I had not, but I don't remember, sir.

Q. If Mr. Parker should testify as to your statements regarding O'Neal and the Indiana Farm Bureau, would you then dispute it?

A. As I have said before, if Mr. Parker stated that I said so and so, I believe that Mr. Parker would tell
1100 the truth as he understands it.

Q. And you have no memory about it now?

A. I have not.

Q. Do you recall whether or not there was anything involved in the Indiana Farm Bureau sales relating to whether or not they sold on erroneous land grant rates?

A. No, I don't know.

Q. Or whether they sold to the Government at all?

A. I don't know, sir. I did not get into that detail, as I told you several times.

Q. Were there some points at which the Indiana Farm Bureau was equipped as a regular dealer?

A. I have understood there was places.

Q. Within the Aetna Company's definition of a regular dealer?

A. I understand so.

Q. Could you name any of those points?

A. I can not.

Q. Now, with regard to this letter which Mr. Cree testified you showed him from Mr. Crapo at the time of his discharge—did you show Mr. Cree any letter from anybody on that occasion?

A. I should absolutely say no.

Q. In speaking about the policy of the Huron Company with regard to warehousing and delivery to
1101 the warehouses by water and silos and so on, the Huron Company owned all of those things, didn't it?

A. They did.

Q. Owned them outright?

A. The silos?

Q. Yes, and the warehouses.

A. Their silos was their warehousing.

Q. They had to carry the capital cost of the investment in those properties.

A. I should say so.

Q. You did not have that capital cost to carry in the way you handled your warehousing, did you?

A. We did not.

Q. You speak about salesmen which you later put on after Mr. Cree left, the increased number of salesmen. Isn't it a fact that the warehouses saved that for you by having their own salesmen?

A. In my opinion, sir, the warehouses cost us a darn sight more than the warehouses.

Q. You did not answer the question.

A. Cost us a darned sight less than the warehouses, I mean.

Q. You did not answer the question.

A. Will you read it again?

(The question is read.)

The Witness: Well, I can not tell you. I have
1102 tried to but I can not.

By Mr. Wooden:

Q. You do not know then as president of the company whether or not it became necessary to put on additional salesmen because of the fact that you discontinued the warehouses?

A. I can not answer that question, sir, because I don't know. That is left up to the general manager as a part of his job.

Q. These so-called warehousemen, didn't you sell the cement to them outright and for them then to distribute it?

A. Not altogether, no, sir. We sent the cement there, and it was our property, and they sold the cement and paid us for it, as I understand it, at the end of the period, whatever it might be.

1103 Q. What did you mean then in this Commission's Exhibit 20-A and B where you wrote Mr. Lingeman about the Milwaukee situation and Pipkorn and said, "I appreciate that when a man buys merchandise and pays for it it becomes his own and that we can not very well tell him what he should do but we must try to prevent a condition of this kind again"?

Mr. Leisure: What page is that, Mr. Wooden?

Mr. Wooden: At the bottom of the first page and top of the second page, 20-B.

A. May I look at that, please?

(The document was handed to the witness.)

A. (Continuing) It is difficult for me to go back five years and tell you just about that Milwaukee and Pipkorn

situation, because I do not know, but I have a feeling in my own mind that the reason was that they had sold this man some cement up there and they had handled it differently than they had ever handled any other particular cement before. That is my reason for saying that "We must try to prevent a condition of this kind again."

By Mr. Wooden:

Q. Do you mean to say that your warehouseman did not own this cement and did not buy it from you?

A. In that particular case I do not know, sir.

Q. I mean the other cases.

A. About the other cases—no, sir. In many of the
1104 other cases we sent the cement to the warehouses and then they sold it and we paid them so much a barrel for every barrel that went through the warehouse.

Q. You kept the title to the cement in your name while it was in the warehouse until they sold it?

A. The title was in our name, as I remember it.

Q. You spoke on cross-examination about some of your Aetna dealers cutting the prices when they sold and that that reflected back. Is that a fair statement of your testimony?

A. Some of the warehouses?

Q. Yes.

A. Warehouses, yes, sir.

Q. How about some of your dealers? Was that true also of the dealers as distinguished from your warehouses?

A. If the dealers cut prices I suppose that would be reflected throughout the trade, but I was referring entirely to the warehouses there, sir, as a means of why we should get through with the warehouses and stop that awful expenditure of so many hundreds of thousands of dollars in one year.

Q. Did the warehousemen themselves cut prices?

Mr. Leisure: I think Mr. Johnson explained that all this morning, Your Honor. We are going back over it again.

Examiner Norwood: I think he can go into that.

Mr. Leisure: He explained just how that occurred.
1105 The Witness: Shall I answer this question?

By Mr. Wooden:

Q. Yes, sir. I do not think you have answered it, as a matter af fact, before. Not in that form, surely.

A. I told you that the warehouseman who received the money for the amount of cement that was sold through his warehouse, which he did, had a very fine opportunity and in some cases I am definitely informed that he cut the price to this particular customer or friend, and that then was reflected back to our own trade, to our own other customers or dealers.

Q. As well as the customers of other cement companies?

A. Certainly. It would become eventually common knowledge and then the price would go down.

Q. Then, as I understand, the warehouseman shared with their customers a part of the commission?

A. That was my understanding.

Q. Which you were allowing them?

A. That was my understanding, sir.

Q. You have the same sort of reflection back in the case of dealers who sold Aetna Cement and got out of their territory or cut prices?

A. I do not think we would have any such—that would be their stock. After a man buys his cement and pays for it he has a right to it, according to law, he has a right to do what he wishes, but if he becomes a bad actor, to
1106 tear down your market, as I understand the law,—it is rather foolish for me to talk about law to you gentlemen,—as I understand the law you could refuse to sell him again, if he does not comply with your regular requirements.

Q. Such cases as are involved in Commission's Exhibits 42-D to S (handing documents to the witness)?

A. As to what occurred here, you mean, in these exhibits (indicating)?

Q. Yes. Do those exhibits illustrate that you were just saying?

A. I do not know. I should like to have that investigated. I can not tell you. There was evidently something wrong here. What it was I do not know, I can not tell you, my dear sir, at this time.

Q. Those papers passed through your hands at that time, did they not?

A. They did. I could not make answers to those and I passed them on.

Q. Did you pass them on without knowing their import, and the notes made on them about these particular dealers getting outside of their regular territory, or cutting

prices, or in bidding on Government business f. o. b. mill instead of destination?

A. I looked at those and then passed them on.

Q. Did you inquire into Mr. Calvin's prior record
1107 before you employed him as manager of your company?

A. I gathered such information as I could from a few people who knew him, and from what I had heard of him as he lived in Jackson, Michigan.

Q. Was he manager of the Consolidated?

A. He was.

Q. At Cement City?

A. Yes, sir.

Q. Did you know at the time you employed him that the Consolidated had gone into receivership and failed?

A. I did not.

Q. You did not inquire into that?

A. I did not.

Mr. Wooden: That is all.

Recross Examination by Mr. Leisure.

Q. Mr. Johnson, have you made clear to His Honor in regard to these warehousemen wherein they claimed commission whether or not this cement went through their warehouse in those sections?

A. I do not know that I did, but there were one or two, —there might be more of course, Mr. Calvin has got that detail down, but I do know there were some warehouses who received a commission for everything that was sold in that territory, whether it went through the warehouse itself or not.

1108 Mr. Leisure: That is all.

By Mr. Wooden:

Q. Was that in accordance with contracts to that effect?

A. Sir?

Q. Was that is accordance with contracts to that effect?

A. I do not know what contracts they had with these warehouses, Mr. Wooden.

Mr. Wooden: I ask to have these marked Commission's Exhibits 101-A and B.

(The documents referred to were marked for identification "Commission's Exhibits 101-A and B.")

Mr. Wooden: Your Honor, some reference has been

made by the witness, and perhaps by others, to the state of Mr. Lingeman's health. I have here an affidavit from Mr. Lingeman's physician certifying to the danger that would result to Mr. Lingeman if he were called here to testify. I might say that he had been subpoenaed, but upon this showing by his physician, which I have caused to be numbered Exhibit 101-A and B, which I offer for the record, we have not insisted upon his appearance.

Mr. Leisure: No objection, Your Honor.

(COM. EX. 101-A and B was offered and received in evidence.)

1113 (COM. EX. 102-A to F, was offered and received in evidence.)

1117 SOL ROTHBARD, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

1118 *Direct Examination by Mr. Wooden.*

I am employed as an attorney in the Bureau of Reclamation, Department of the Interior, and have been there for the past 4 years. My duties during that period have been varied. At the present time they consist, among others, of the examination of all bids received for various commodities in connection with the construction of reclamation projects. I could not begin to say how many commodities are included in such purchases, but there are scores of them. They include cement.

1119 My duties require the examination of bids for the legal sufficiency to see that they are properly prepared in accordance with the act of Congress, an examination of abstracts of bids submitted with the bids and to see that they are executed properly and that a bond is executed properly.

Q. Did you pass in any way upon the matter of whether the bids are in accordance with the section of the statute No. 3709?

A. Yes, sir.

Q. What does that statute call for?

A. Well, it call for advertising for government needs, I mean in other words before any purchases can be secured or can be made by the government, we must advertise for bids.

Q. What is the purpose of advertising for bids?

Mr. Leisure: That question is objected to, if the Court please. The record in the statute speaks for itself.

Mr. Wooden: I am asking for the witness' knowledge as to the purpose behind his own activities.

Examiner Norwood: I think he can tell that.

Mr. Leisure: The statute describes that, and I do
1120 not think the witness' explanation is material, therefore I object to that question.

Examiner Norwood: Objection overruled. He can give us his understanding of that.

The Witness: My understanding is in order that we may secure competitive bids and award contracts to the lowest bidder.

By Mr. Wooden:

Q. In the case of cement, have you been able to carry out the purposes which you have just stated?

A. Not entirely, no.

Q. To what extent have you been able to?

A. That is rather difficult to answer. If you should just make it specific?

Q. I was merely following your lead in your answer. You said "not entirely", and I merely wanted you to explain your answer.

A. Well, I said to a certain extent we were not able to obtain—what I meant was, we were not able to obtain competitive bids, say in perhaps 50 per cent of all bids received in connection with the purchase of cement. That is just a rough guess there.

Q. What is your criterion as to whether the bids are competitive or not?

Mr. Leisure: I object to that question, if the
1121 Court pleases. His criterion is not material to any of the issues.

Examiner Norwood: It goes to the explanation of his previous answer. Objection overruled.

The Witness: Well, when bids are received in different amounts and various amounts, they are submitted on a competitive basis, otherwise they are not competitive.

By Mr. Wooden:

Q. When you say in 50 per cent of the cases they are competitive—

A. (Interposing): Don't pin me down to 50 percent. It is approximately that amount. It is just a rough guess.

Q. Are you figuring that on the basis of the number of purchases, or quantity or what?

A. No, the number of purchases.

Q. Let me get it clear, Mr. Rothbard. When you make your 50 per cent division, are you applying it to the purchase of cement or to the purchase of all commodities?

A. No, I am applying that to the purchase of cement.

Q. To the purchase of cement? I want to make that clear.

A. Yes, sir.

Q. Do you include in the cases where they are competitive on their face, differences in terms and things of that sort as distinguished from differences in price alone?

1122 A. I don't follow you on that question, Mr. Wooden.

Q. Will you read the question?

(The question is read.)

The Witness: Well, differences in price and terms, I would say.

By Mr. Wooden:

Q. Do you include the terms as a part of the class of cases where they are different from each other?

A. Right.

Q. Is there any difference in your experience between the degree of identity on cement bidding and on other commodities?

A. Yes, there is.

Q. In what way?

A. Well, we have received less competitive in connection with cement than with any other commodity.

Q. Your Bureau made efforts to induce cement companies to bid on a f. o. b. shipment basis?

A. Yes.

Q. With what success?

A. With no success.

1123 The witness identified Com. Ex. 103 A and B as a letter prepared by him to Ash Grove requesting the company to send a representative to Washington for the purpose of discussing the cement bidding with representatives of the Bureau of Reclamation, Department of Interior. That letter or a similar letter was sent to other cement companies as well as to Ash Grove Lime and Portland Cement Company.

1124 The witness identified Com. Ex. 104 A, B and C as a photographic copy of the reply made by Ash Grove to this exhibit 103 A and B.

1125 Examiner Norwood: (Examining documents:) I think this is competent as an explanation of this particular company, as to why their bids were identical. They may be received as Commission's Exhibits 103-A and B and Commission's Exhibits 104-A, B and C.

(COM. EX. 103-A and B, and 104-A, B, and C were offered and received in evidence.)

By Mr. Wooden:

Q. I notice in Commission's Exhibit 103-A and B, which I understood you to say you prepared over the signature of Commissioner Mead, is that right?

A. That is right.

Q. Your statement "With these identical bids
1126 then being received there was not any reason for continuing the practice of inviting the competitive bids."

A. That is right.

Q. That you might just as well deal with one company to begin with.

A. That is right, or purchase in the open market.

Q. Now do I understand that you wrote the same letter exactly to other cement producers that you wrote to the Ashcroft as shown by Exhibits 103-A and B?

A. Yes.

Q. What other companies did you write to?

A. The Monolith Midwest Company, the Colorado Portland Cement Company and the South Dakota Cement Company.

Q. Did you get replies from all those that you named?

A. All but the Monolith Company and that company sent a representative to Washington.

Q. Did any of these companies discuss the relationship of the code to their policy of quoting only destination prices?

A. Yes.

Q. What was their position with reference to the code?

A. Why they took the position that the—

1127 A. Well, answering that question, they took the position that the code required destinaton bids only.

The witness identified Com. Ex. 105 A, B and C
1128 as a letter received from the South Dakota Cement

Plant in reply to a letter from the Bureau of Reclamation, Department of Interior of March 27, 1934, inviting the company to send a representative to Washington.

Mr. Wooden: I offer it for the record.

Mr. Leisure: I do not like to just object to these and then have it overruled and have it go in, without having it appear in the record as to the reasons back of some of this. I would like to know from counsel how he feels this is material to any of the issues in this case. I think it is fair to Your Honor that he should state that.

Mr. Wooden: I am willing to state it. This was during the code period. This witness, representing the Bureau of Reclamation, was seeking to get the industry to make quotations f. o. b. shipping point. This is one of the replies they got. Now I am mindful of the fact that the South Dakota Plant is not a respondent in this proceeding, but I offer that particular document
1129 on the basis of the statute which I have called attention to recently, the statute of June 20, 1936, I believe, directing that entries made in the ordinary and usual course of business be received as competent evidence without regard to their weight. This particular document shows the situation, the feeling throughout the industry as to the relation of the code to this practice of selling f. o. b. destination as distinguished from f. o. b. shipping point.

Mr. Leisure: Well, my objection goes to two parts of that offer of proof, Your Honor. It is incompetent, irrelevant and immaterial as to the first part because if this letter is not written by a respondent the acts of other members of the industry who are not defendants, are not named as conspirators, can not possibly be binding upon any of the respondents in this case.

As to the rule of law applying, it is very apparent from the counsel's own statement of it, that it can not apply in this case, because that rule of law applies to books and records kept in the regular course of business. Now a letter is written, and a copy appearing by photostat, in some other jurisdiction does not come under that statute.

Mr. Wooden: It is not confined to the books.

Examiner Norwood: The issues in this case are
1130 sufficiently broad to bring in evidence of the attitude of the entire industry, and information as to effects,

probable effects or supposed effects, and also the pleadings cover acts and things prior to this time, and it goes into the history of this development.

Examiner Norwood: Yes. Objection overruled.

Mr. Zimmerman: The Commissioner is aware, of course, that the author of this communication is not connected with any respondent here.

1131 Mr. Wooden: I made that statement myself.

Examiner Norwood: Yes.

Mr. Zimmerman: It was difficult for me to believe that the Commissioner fairly understood that these are some things that are being offered simply as a matter of opinion by somebody who was in no wise connected with the respondents.

Examiner Norwood: There will be a question in here just as to what weight is to be given the circumstance of these identical bids.

Mr. Leisure: It goes further than weight, Your Honor, it goes to the fairness of it in a procedure of this kind. If testimony of this kind is to be adduced in the hearing, which might influence Your Honor's mind, the reading of this letter, surely we should have the opportunity to cross-examine the author of the letter.

Examiner Norwood: He is not claiming that any offenses have been committed by any of these respondents by explaining their position in the matter. It is not brought in for that purpose.

Mr. Zimmerman: What does it go to, sir?

Mr. Leisure: That is why I asked that an offer of proof be made, so we can find out. I can not understand what issue it proves or tends to prove.

Mr. Wooden: Oh, well, the issue that it relates to

1132 is the question of the industry's policy of selling only at destination prices.

Mr. Leisure: But the industry, Mr. Wooden, is not on trial here. There are a certain number of defendants that are on trial.

Mr. Wooden: That is right, but here is an instance where the effects of respondents' policy on that matter have extended beyond their own particular group, taking in an outsider.

Mr. Leisure: Then it can only mean, Your Honor, that the acts and actions of these respondents is reflected in the industry outside of these respondents. If that is true

I say again we should have the right to cross-examine these people.

Examiner Norwood: Or affected by it.

Mr. Leisure: We should have the right to cross-examine those people who reflect those actions.

1133 Mr. Wooden: I say that evidence, even though it is not within the complaint, is pertinent and competent to show a continuity of action. I do not contend that things which the code specifically and directly provided for were illegal at that time, but the proof of what was done under the code is, nevertheless, competent to show any continuity of action reaching back behind it or coming down since the code.

Examiner Norwood: I think it is very clear—this is being admitted for certain purposes. It may be received as Commission's Exhibit 105-A, B and C.

1136 Q. Did you check the representations made to you by cement producers as to the requirement of the code, that they sell only f. o. b. destination?

A. Yes.

Q. What did you do?

A. Well, let me answer it this way. It was done with my knowledge. A letter was prepared making proper inquiries of the code authorities. I saw the letter before it was mailed, and I saw the reply.

1137 Q. Did you reply to it?

A. Yes.

Q. Are Commission's Exhibits Nos. 106-A to E, inclusive, the correspondence that you had with the N. R. A. Administrator on that subject?

A. Yes.

1138 Q. After getting this advice from the N. R. A. did you communicate the substance of it to any cement companies, as to the relationship between the code and their quoting only f. o. b. destination?

A. Yes, on one occasion.

Q. What was that?

A. To the representative of the Monolith Midwest Company. That was on the occasion of his visit to the office in response to our invitation.

Q. What was said on that occasion?

A. Well, he contended—the same as the other companies had—that his company was obliged to bid destination only, that is, submit bids on a basis of f. o. b. destination only.

Q. Give the man's name, and the date.

A. I do not recall his initials, but his name was
1139 Rea, general manager, I believe, of the Monolith Company.

Q. Do you have a record that gives you his initials?

A. Yes. (Examining documents.) This is in my handwriting. Mr. A. N. Rea, Jr., salesmanager of the Monolith Portland Midwest Company.

Q. And can you fix the time?

A. April 16, 1934.

Q. Were you aware at that time what the position of the N. R. A. was on that question?

A. Yes.

Q. Did you inform him?

A. Yes.

Q. Did you thereafter get f. o. b. mill quotations from the mills?

A. No.

Q. Did you about that time endeavor to get bids only on a mill shipping point basis?

A. We endeavored, yes.

1140 Q. Will you state what you did, or what you endeavored to do?

A. Well, the invitations for bids were prepared on the basis of f. o. b. destination bid only, that is, with the request that f. o. b. mill bids, rather, be submitted only, but none of the bids were submitted in that manner, they were all f. o. b. destination.

1142 Q. Mr. Rothbard, can you state of your own knowledge what the Bureau of Reclamation did with regard to attempting to get f. o. b. mill bids after learning from the N. R. A. that the code did not require destination prices only?

A. Why we continued to advertise for bids f. o. b. shipping point without disclosing the destination.

Q. And with what result?

A. With no results.

1144 Q. Showing you papers marked Commission's Exhibit 107-A and B for identification, will you state what that paper is? (Handing paper to witness.)

A. (Witness examining paper.) This is a memorandum prepared by me for the Secretary of the Interior relative to our attempts to secure f. o. b. mill bids.

Q. Which has just been the subject of your testimony?

A. Exactly.

Mr. Leisure: I object to it as incompetent, immaterial and irrelevant. Whatever this witness may have written to his superior in the government is not binding upon any of these respondents, and it is hearsay and a self-serving declaration.

1145 Examiner Norwood: I cannot split hairs on the exhibits. There is a vast number of them coming in here, and I do not know but what in my consideration, I may not discard vast numbers of them. Unless its irrelevancy appears very clearly, I am going to receive them.

The witness identified Com. Ex. 108-A, B and C

1146 as a letter received from the National Recovery Administration enclosing a copy of a general letter to all the members of the cement industry. The enclosed letter was from the Code Authority of the Portland Cement Industry. That letter is part of the files of the Bureau of Reclamation.

Mr. Wooden: I offer these papers for the record.

Mr. Leisure: No objection.

Examiner Norwood: Received.

(COM. EX. 108-A, B, and C was offered and received in evidence.)

By Mr. Wooden:

Q. Now showing you papers marked Commission's Exhibit 109-A, B for identification, I will ask you what they are? (Handing papers to witness.)

A. (Witness examining papers.) This is a letter addressed to Dr. Elwood Mead, Commissioner of the

1147 Bureau of Reclamation by the Colorado Portland Cement Company.

Q. Is that from the files of the Bureau of Reclamation?

A. Yes.

Mr. Wooden: I offer it for the record.

Mr. Leisure: No objection, Your Honor.

(COM. EX. 109-A, B. was offered and received in evidence.)

Q. What is the paper I now hand you marked Commission's Exhibit 110-A and B for identification? (Handing papers to witness.)

A. (Witness examining papers.) This is a let-

1148 ter addressed to Dr. Elwood Mead, Commissioner of the Bureau of Reclamation, by the National Recovery

Administration, and it is from the official files of the Bureau of Reclamation.

Q. Does it relate to the subject of land grant rates on cement?

A. Yes, it does.

Mr. Wooden: I offer it for the record.

Mr. Leisure: This being between two departments of the government, we object on the ground it is incompetent, immaterial and irrelevant and not binding on any of the respondents.

Mr. Zimmerman: The same objection as to Exhibit 109.

Examiner Norwood: Received.

Mr. Wooden: For the benefit of respondents' counsel, there is a paragraph in this letter which I am willing to spread on the record, because I think they would be glad to have it. The writer of this letter says: "We have very carefully studied the price structure in the Portland cement industry and are not convinced that the industry is defeating the purpose of land grant freight allowances.

Unless further evidence can be brought to our atten-
1149 tion, we are of the opinion that quite the contrary is true."

Nothing further on Mr. Rothbard.

Cross-Examination by Mr. Leisure.

Q. Mr. Rothbard, what was the section of that statute that you said these bids were made under?

A. 3709.

Q. I believe you answered Mr. Wooden that under that statute you advertised for competition, so as to get competitive bids?

A. Well, the statute does not say to get competitive bids. It merely compels advertising.

Q. And the competitive bid part was your conclusion, wasn't it?

A. Not my conclusion, but the conclusion of the Comptroller General, the Comptroller General's decision interpreting section 3709.

Q. You are giving their conclusions here now and not your own?

A. Both their conclusion and mine.

Q. Then it is your conclusion?

A. Yes.

Examiner Norwood: Were those official decisions or opinions announced?

The Witness: I am referring, Your Honor, to the
1150 official Comptroller General's decisions.

Q. Then you feel that identical bids are not competitive?

A. That is the way I feel about it, yes.

Q. And you said for Mr. Wooden's benefit, you meant when you expressed your opinion about competition, the provisions might be different as to price and as to other items in the bid, is that so?

A. Yes.

Q. You feel there is no competition when the bids are the same?

A. Exactly.

1151 Q. Well, let us take a very homely example. Suppose you have two farmers who are selling eggs, if they are selling at the same price and have road stands out on the road, do you feel if they are selling at the same price that they are not competing with each other?

A. That is the way I would interpret it, yes.

Q. Now, take for example the telephone system in Philadelphia; they have two systems there, each charging five cents; do you feel that because they each charge five cents they are not competing with each other?

A. Well, yes.

Q. On the bids that you are asking for, suppose they are different amounts, then you think they are competitors?

A. That would be my interpretation of it, yes.

Q. And if one man should lower the price below the then bid and all the others should drop to that, and they would be the same, you feel that would not be competitive?

A. Exactly.

1152 Q. I say, what is that make any bidder the effective bidder under this statute?

A. Oh, the effective?

Q. The effective bidder, yes. The one that you make the award to.

A. Well, I suppose you are as familiar with the provisions of this statute as much as I am. The statute provides that we must advertise our needs and that the award is to be made to the lowest responsible bidder. I will

just take that back for a moment. The section provides that we advertise our needs. The interpretations of the Comptroller General, who we are bound to follow, whose decisions we are bound to follow, states that we must award after advertising to the lowest responsible bidder.

Q. I understand that, and you have so testified, but I am addressing my attention now to your remark to Mr. Wooden that when the bids were identical, they were not competitive.

A. That is my conclusion, yes.

Q. So I then asked you, what is it that makes any
1153 bidder the effective bidder? I am not talking about when they are identical.

A. I do not quite follow your question. By "effective bidder," just what do you mean? Do you mean by that the lowest bidder?

Q. The one to whom the award is given.

A. He must present a lower bid than any other, and must of course be a responsible bidder.

Q. The simple answer is that he is the lowest bidder?

A. Yes.

Q. Now, if the others dropped down to his price, you think that that is not a competitive bid?

A. There would be no basis to compare, no comparison.

Q. So it would not be competitive?

A. Not as I see it.

Q. Isn't it competition that might force them down to that price?

A. Not to an identical price.

Q. Suppose you were the person that was selling instead of the person that was buying, and someone was selling cheaper than you were, so that you had to lower your prices to meet his, and the prices become identical, would you feel that you were meeting competition, that you were submitting competitive prices?

A. In a sense, yes, but—

1154 Q. (Interposing) Let me give you another example.

Mr. Wooden: Let him finish his answer.

The Witness: That's all right. I will let my answer rest there.

Q. Let me give you another example. Suppose the lowest bidder were submitting a price so low that over a period of time it caused his company to go into bank-

ruptcy and all the other companies had dropped down and met that price. If you were that bidder's concern, would you feel you were not submitting competitive prices?

A. That is rather a difficult question to answer. Would you mind reading that again, please?

(The question is read.)

The Witness: If you were that bidder's concern?

By Mr. Leisure:

Q. The manufacturing concern that submitted the low bid, which was so low that he could not even pay labor and overhead and went through bankruptcy, and the competitors came down and quoted identical prices with you. If you owned that concern, would you feel that you were not submitting competitive bids merely because they were identical?

A. I would say they were not competitive bids, yes.

Q. Well, suppose while those low bids which did not even pay overhead were being quoted, and they were
1155 all identical and not competitive as you have described, one of them should raise his price, would you feel that then the bids were competitive?

A. For our purposes, yes.

Q. I am talking about on the other end for a moment. Suppose you were the seller?

A. I would answer yes. That would be bidding on a competitive basis.

Q. And you would feel that regardless of the fact—you would feel just because a man had raised his price and made it different, that that made it competitive?

A. I will say again it would be competitive for our purposes, yes. Considering the government.

Q. Couldn't it be just as competitive from the seller's standpoint, whether his competitors dropped and met it or whether one of them raised their price?

A. It would not make any difference whether they lowered or raised the prices, if they were different, there would be competition.

Q. But if they were all the same, then it would not be competitive?

A. That is my interpretation of it, yes.

Mr. Leisure: I think that is all.

Redirect Examination by Mr. Wooden.

Q. Mr. Rothbard, you call for sealed bids on your 1156 invitations?

A. Yes.

Q. Why do you have them sealed?

A. So that they would not be observed by others. In order to keep them from the other bidders and not know how the other bidders bid.

Q. Thereby to insure as far as possible, that you will get different prices, is that right?

A. Exactly.

Q. Have you observed in the cement industry that the mills quoting on your Bureau requirements are located at varying distances from the destinations on which they quote?

A. Yes.

Q. Those differences in distance and in freight costs, have you considered that?

A. Yes.

Q. Are those differences frequently substantial?

A. Yes.

Q. Are they differences at times of several hundred miles between—

Mr. Leisure: (Interposing) I do not believe that this is redirect, if the Court pleases.

Mr. Wooden: I am leading up to something.

Examiner Norwood: Proceed.

By Mr. Wooden:

Q. Are there differences sometimes of several 1157 hundred miles between the mills bidding?

Mr. Leisure: I submit that we should have the details so that we can meet them. We would like to meet this evidence and cannot do it in this way.

Mr. Wooden: It is a matter of common knowledge.

Examiner Norwood: I think he can give those general particulars about these things, especially about things that are well known and obvious. Read the question.

(The question is read.)

The Witness: Yes.

By Mr. Wooden:

Q. Now, referring to Mr. Leisure's analogy of the runners who ran a dead heat and came out tie, what would

you say if one runner had to run a hundred miles and the other had to run two hundred miles and yet they came out even?

A. What would I say as to that?

Examiner Norwood: Whether that is competition.

By Mr. Wooden:

Q. Whether that is competition.

A. There would not be competition.

Mr. Wooden: That is all.

1161 *Recross Examination by Mr. Leisure.*

Q. Just one further question. You had other industries which submitted identical bids other than cement, did you not?

A. Not that I recall. Now, there may have been one or two instances, but offhand I cannot recall.

Q. Did you ever have occasion to look at Mr. Ickes' testimony in the Senate hearings in the Wheeler Investigation?

A. No, I never have.

Q. Just let me show you here page 287 of his testimony where he says: "The following list will give you some idea of the scope of materials and equipment, among others, on which identical bids have been received." Will you just read those please? Start at the left and read them for the reporter.

A. (Reading) "School equipment, typewriters, steel lockers, typewriter stands—

Mr. Wooden: (Interposing) Were those received by the Bureau of Reclamation?

The Witness: I can say that, glancing over this list of equipment, there are only three or four items among all of them that I ever had to deal with, and I can name them if you want me to. Fire extinguishers, electrical transformers, cable and copper pipe. That is about all I can remember having dealt with.

1162 By Mr. Leisure:

Q. And the other 40 or 50 names there, you have no bids from those industries?

A. No, not that I recall.

By Mr. Zimmerman:

Q. Mr. Rothbard, identity of prices is not the only criterion as to what bids are identical?

A. Identity of price is the most important thing.

Q. But that is not the only test, is it, upon which bids are awarded?

A. As far as I am concerned, it is.

Q. Well, now, let us see. Do you not sometimes
1163 award contracts where more favorable terms of payment are granted by one competitor other than by others?

A. You mean as far as discount and other matters are concerned?

Q. Yes.

A. That goes into the computation, yes.

Q. And where there is such a difference in bids, they are not identical, are they?

A. Considering discounts,—

Q. (Interposing) Just answer yes or no, please; not a discussion. Let us get to the point.

A. Are they or are they not identical?

Q. Yes or no.

A. Don't rush me. Will you read the question?

(The question is read.)

The Witness: They are not identical.

By Mr. Zimmerman:

Q. Well, now, you have answered the question. Let us go on to something else. Suppose one bids protects against any increase or decrease in the market price, and others do not; are they then identical?

A. I would not consider that.

Q. You would not consider that whether it was identical or not?

A. Unless the invitation called for that partic-
1164 ular item, I would not consider that.

Q. Would you say they were or were not identical if one set of bids protected against any increase in the market price or any decrease?

A. I could not answer that question yes or no. I would say this, that a bid which contained a provision of that kind would not be considered unless the other bidders were given an equal opportunity to do likewise.

Q. You do sometimes put such a provision in your invitations to bid?

A. Not that I remember.

Q. Do you ever put anything in your invitations to bid with reference to the increase or decrease in the cost of delivery, such as freight rates?

A. I don't recall that.

Q. You don't know whether you do or not?

A. Well, I would say I don't know then.

Q. Now, then, if one bidder did offer to protect the government against any increase or to give the benefit of any decrease in freights, where there was a destination cost bid, would you consider that if others did not give the same protection, that the bids were identical?

A. I would not consider that bid at all. That bid would be rejected.

Q. It would?

1165 A. It would.

Q. Because it offered to give the government the benefit of any increase or decrease?

A. Unless the other bidders were given an equal opportunity to bid a like—

Q. (Interposing) I have not said anything about that at all, Mr. Rothbard.

A. Well, then, my first answer goes. That bid would be rejected.

Q. Because they offered to give the government the benefit of any decrease in the freights?

A. Exactly.

Q. That would be irregular in your opinion?

A. Exactly.

Q. Regardless of what was in the invitation to bid?

A. Oh, no. If we asked for that, if that were in the invitation to bid, we would consider that, yes.

Q. Suppose there was a protection offered by one bidder against any taxes that might be imposed, and not by other bidders, would that be considered an identical bid?

A. If the bidder were permitted to do that by the invitation, we would consider that, yes.

Q. In determining whether it was identical or was not?

A. No.

Q. Or in determining to whom the bid was to be awarded?

1166 A. There obviously would not be identical bidding if advantage were given by another bidder.

Q. If there were any variation in the terms or conditions which are favorable or offered by one bidder and not by the others, the bids then are not identical?

A. If that is provided for in the specifications or invitations.

Q. You would not consider them identical in any event, would you?

A. It would not consider them identical if the specifications did not provide that.

Q. Do you ever take into consideration the matter of location of a mill, that is, where a mill is located so close to the job that they might be able to give faster delivery service and require less warehousing on the part of the people at the job?

A. Yes.

Q. As being an advantage?

A. Yes, that would be an advantage to the government.

Mr. Zimmerman: That is all.

1167 Washington, D. C.,
Thursday, December 16, 1937.

1168 Mr. Wooden: I would like to make this brief statement, your Honor. Referring to some testimony and some of the discussion with counsel for respondents on the record with relation to the matter of contacts between Government witnesses, or prospective Government witnesses and representatives of the respondents, I wish we could get a frank statement or discussion of just what respondents' counsel consider to be the scope of their rights in such matters, so that we may avoid, if possible, in the future any dispute or objection to the nature of such contacts.

Mr. Leisure: I think that is a very fair question, Your Honor, and I am very pleased for the opportunity to answer it. Not only will I be pleased to answer it, but if there is any question about it we have a memorandum of law prepared which we will be glad to submit to Your Honor on the subject.

Our understanding is when the Government has subpoenaed one of our clients as a witness that we have a

perfect right to talk to our client and prepare our case
1169 for trial, because otherwise all the Government would need to do in the case would be to send out all of its subpoenas and it would be impossible for us to prepare any case for trial.

As far as our talking to any Government witness which is not a client of ours,—we, of course, have not done so, and we have no intention of doing so,—may I say that the law is perfectly clear that we have a perfect right to talk to anybody under subpoena. The only problem is whether or not we in any way coerce that man. The law is very clear that we have a right to talk to anybody about anything if we talk to them in a proper way.

However, it is our position, and we are prepared to maintain it, that where our own clients are subpoenaed by the Government we have a perfect right to talk to them about our preparation of this case.

Mr. Wooden: Your Honor, I have not examined the law on the subject. I am only speaking of my general impressions as to the law, and they are to the effect that when a witness has been subpoenaed as a Government witness any effort, whether he be a client of respondents or not, any effort to coach him, or, shall I say, approach him as to his testimony is improper. I have no doubt that up to that time there is perfect liberty for respondents' counsel to obtain information from a man who may become a witness, but as to the question of preparing their case
1170 it seems to me that is something that should more properly come along after he has testified as a witness for the Government and not in advance of his testimony as a witness for the Government.

Mr. Leisure: I am glad Mr. Wooden has made this frank statement on the record, because it is my impression, and it was my impression yesterday from some of the atmosphere that was being built up, that he was laboring under this misconception of the law. I know perfectly well, at least I imagine how he got that impression, because I too have been in governmental service for a good many years of my life and I never saw a Government investigator in my life that did not have the idea that once a subpoena was served on a man as a Government witness that no one dared look at him, much less talk to him. I was afraid that Mr. Wooden, without looking up the law, was laboring under that misconception yesterday. But

such is not the law, and, as I say, we are prepared to inform Your Honor fully on that, if you want to do so.

Now as to coaching witnesses, I do not think Mr. Wooden intended to imply anything in that. I am sure we are not accusing him of coaching witnesses, and I know he does not mean to charge us with coaching witnesses. I can assure Mr. Wooden now that either as to his witness
1171 or as to ours there will never be any talk about that by us. That is perfectly proper and honorable as attorneys in a proceeding, and I am sure he does not intend to suggest anything by the word "coaching."

Examiner Norwood: Well, as I suggested yesterday, that the testimony appeared to have some application to this man who had been discharged, as to the attitude in regard to him, and I let it in on that account. I do not think we will have anything else come up under it. We do not need to bother any further with the matter.

Mr. Leisure: I merely wanted to say that we are not suggesting that the Government was coaching witnesses. I am sure they are too highminded to coach witnesses.

Mr. Wooden: When it comes to witnesses whose interests are adverse the suggestion that we might be able to coach them loses its point. We are under enough difficulties in getting evidence from adverse witnesses without those adverse witnesses being in close contact and consultation with respondents' counsel, after they have been subpoenaed as Government witnesses.

Examiner Norwood: I think Mr. Leisure is right about that. They have a right to prepare their case.

Mr. Wooden: I think we still draw the line as to just where the proper procedure ends and where improper
1172 procedure begins. I do say that that line has been crossed in one respect in the relation between Mr. McKean and Mr. Cree. The suggestion to him that he might be useful in preparing respondents' case carried with it the implication of compensation.

Mr. Leisure: Of course that is another case and I will be glad to try that case in the proper forum. I do not think there is anything improper at all in counsel for Aetna trying to get in touch with an individual who has been with that company for 26 years and for him to prepare his case. I do not think there is anything improper in it at all. As I say, it does not seem to me I can try that case in this forum.

Examiner Norwood: I think that is right, if he did not know that he had been subpoenaed.

Mr. Leisure: I do not think anyone has suggested he was subpoenaed when Mr. McKean did that.

Mr. Wooden: I should like to have, as soon as possible, your statement on the law.

Mr. Leisure: I will be glad to furnish it to you.

Mr. Wooden: Is it ready yet?

Mr. Leisure: We will have to get it. We will be very glad to give it to you.

Mr. Wooden: We will pass that then for the time being.

1174 P. I. TAYLOR, being recalled as a witness for the Commission, and having been previously duly sworn, testified further as follows:

Direct Examination by Mr. Wooden.

The witness identified COM. EX. 111A to F (formerly marked as Resp. Ex. No. 2) as papers covering bids
1175 received for 10,000 barrels of cement for the Columbia Basin, Washington, project under invitation 38067B-1, which were opened on February 21, 1935. Page "F" is an abstract of the bids showing the names of the bidders and the amounts bid. The other papers than F" consist of official papers of the Bureau relating to the decision as to what to do with the bids that were received. There is a letter from the Acting Chief Engineer in Denver, Colorado, to the Commissioner of the Bureau of Reclamation in Washington describing the bids received and the conditions and so forth of the invitation. There is also attached a letter to the Comptroller General of the United States under date of March 8, 1935 signed by Harold L. Ickes, Secretary of the Interior; also a letter to the Secretary of the Interior dated March 29, 1935, signed by Elwood Mead, Commissioner.

Mr. Wooden: I offer those papers for the record.

1176 Mr. Leisure: Your Honor, we object to these on the ground that they are mere abstracts, and unless there is some agreement that the originals are available to us which I had supposed was well settled, that both sides could do that until yesterday, when I attempted to

offer an abstract and it was objected to and it was kept out, I had had no objection, in trying to save time as you do in any case where you have complicated bookkeeping entries. I have no objection at all to both sides being allowed to put in abstracts, with the understanding that the record can be corrected from originals if it can be corrected, but I cannot sit here and allow abstracts to come in without some understanding that I will have the originals made available to me in order to correct them if they are wrong.

Examiner Norwood: Are those originals secret documents?

Mr. Wooden: The witness can answer that better than I, but I do not see why the bids themselves after they are opened and read, I do not see why there should be anything secret or confidential about them.

Mr. Leisure: I do not only want the bids, your Honor; I want the invitations. That is important.

Mr. Zimmerman: We learned yesterday that without the invitation to bid, you really could not tell anything
1177 about what the situation was.

Mr. Wooden: The invitations to bid are certainly public too. They are sent out to the bidders and broadcast.

Mr. Zimmerman: I understood the witness was going to bring those invitations when he came back.

Examiner Norwood: What about that, Mr. Witness? Are those secret documents in the department?

The Witness: The bids, as I understand, are on file in the Returns Office and are available to anybody.

Examiner Norwood: Any citizen of the United States can see them.

Mr. Wooden: They are public records.

Examiner Norwood: I am going to receive these with that understanding, that these original papers are available to the respondent in the offices where they can go and see them. If it appears that they are denied access to them, you can report it to me and we will see what can be done about it.

Mr. Leisure: That has already happened, and I am so reporting to your Honor now.

Examiner Norwood: With regard to what?

Mr. Leisure: That we tried to see these originals of these very papers and we were turned away.

1178 Examiner Norwood: What did they tell you?

Mr. Leisure: They were secret files of the goverment.

Mr. Wooden: My understanding that these bids are in the General Accounting Office here.

The Witness: Yes.

Mr. Wooden: And available to any one who wants to go and see them. I am not aware of just what Mr. Leisure is referring to. The policy of the Bureau of Reclamation is something that I have no control over, but I add my hearty wish that every courtesy and liberality be extended toward the examination of the original papers, the basic papers.

Mr. Leisure: I suggest, your Honor, that in the meantime we mark these for identification, and I think that will produce the cooperation of the government with the understanding that we will be able to see these bids, but if they are allowed in over our objection, I am fearful that we may meet with the results in the future that we have in the past, so I am still objecting to them and I ask that they be marked for identification until both sides are satisfied as to the originals.

Mr. Wooden: Do I understand, Mr. Leisure, that the very papers which everyone agrees, apparently, are
1179 public documents, have been denied to your representative?

Mr. Leisure: Yes, sir. Two representatives.

Mr. Wooden: I do not understand that. I do not see why it should be so.

Examiner Norwood: I think you have simply gone to the wrong people to see them, and I think a letter from the Chairman of the Federal Trade Commission might get you the privilege of inspecting them, and I shall take that up, if you will give me a letter or written statement specifying which ones you want to see and where they are.

Mr. Leisure: I do not think we should be put to that burden, Your Honor. I think these originals ought to be brought in here and made available to us. If we try to cooperate with the government to facilitate the trial by letting them go forward by putting in abstracts, then I think it is only fair that they should make available to us the original records that we can see without putting us to the trouble of going all over Washington to try to find the originals.

Examiner Norwood: I think these are properly identified papers here showing the facts that are material in this

case, and probably all of the facts that are material in
1180 this case and evidence themselves here and I am going to receive them, and I shall then consider withdrawing them from the testimony in case you are not permitted to examine the originals from which they are made. I will take that upon myself to apply to the proper authorities to get you permission to see them.

Mr. Leisure: I am objecting to them on the ground that the originals are not produced here so that we cannot see the originals.

Mr. Zimmerman: I would like to state a further ground of objection. There has been no foundation laid to show as to whether or not these are even correct copies of anything that is properly in the files and properly admissible. We object on that ground. We object upon the further ground that unless and until the original is produced here and the proper foundation laid for the admission of that original, a copy cannot be substituted for the original. We object upon the further ground that these papers do not represent the complete transaction and do not contain all of the information which is pertinent to the transaction in question. Further than that, it was understood and agreed, as I recall, always admitting the possibility of an error in my recollection, but I think it was distinctly understood
1181 and agreed that the invitations to bid would be brought here. They were not here before and it was suggested to Mr. Taylor, and he did say as I remember that he could bring them, and it was understood that they would be brought here, and the matter is not complete unless and until you do have the invitations and the specifications. When I say "invitation to bid," I mean to include the several specifications, because that is the thing by which you determine the nature of the response that has been made by the manufacturers of cement who are respondents here, and they cannot be adjudged fairly by any other means.

Examiner Norwood: Hasn't he testified that all the invitations that went out as shown by those abstracts, were identical?

Mr. Zimmerman: Oh, no. The invitations and specifications vary in accordance with the different jobs. Am I not right about that?

Examiner Norwood: I am talking about a particular job.

Mr. Zimmerman: I don't know what you mean by "identical." You certainly do not mean—

Examiner Norwood: (Interposing) The same invitations go out on a particular job, that is, they are sent out to the various competitors. You send iden-
1182 tical specifications with identical invitations, do you not, Mr. Witness?

The Witness: Yes, we send out identical invitations and specifications possibly to from 10 to 25 cement companies when we are purchasing cement.

Mr. Zimmerman: Then, if he would bring in one of the invitations and specifications, that we might consider as being the same as sent to all of the bidders.

Mr. Wooden: There are two here now, and they have been marked.

Mr. Zimmerman: Is there one here on this particular job?

Mr. Wooden: I don't know.

Mr. Zimmerman: You would not say that the specifications and invitations on the Grand Coulee Dam would be exactly the same as upon some other job?

Mr. Wooden: No, I could not say.

Mr. Zimmerman: The witness could not say that either.

Mr. Wooden: No, I don't think he could. But as to the matter of whether these are original documents, your Honor—

Mr. Zimmerman: (Interposing) You cannot tell whether he asked for destination cost prices, whether f.o.b. mill prices, or destination prices, or wheth-
1183 er there were provisions in there giving the details of land grant freight rates, which some of them did set forth, the land grant rates. In one of these bids you will probably find the invitation to bid contained three or four pages of land grant rates and which were set forth by the government.

Mr. Wooden: Can't we shorten this?

Mr. Zimmerman: Yes, by producing these things.

By Mr. Wooden:

Q. Will you, Mr. Taylor, undertake to produce a copy of the invitations to bid and the specifications in each of the projects where we put the abstracts of bids in evidence?

A. I can explain that by saying that this short form invitation is different from what we call our Washington

or Denver specifications which cover several pages of specifications, and while we keep a file, or rather a surplus stock of Washington and Denver specifications, we do not have surplus copies of those short form invitations, but we can get a copy of the original that was sent out in every case, yes.

Q. And will you undertake to do so?

A. If you will give me a list.

Q. Yes; after we are through, I will do that.

Mr. Zimmerman: Now, I say unless and until those things are produced, this transaction is meaningless.

1184 You cannot tell anything about whether they asked for one kind of a price or another, or whether they wanted to include land grant rates or not.

Mr. Wooden: The witness has testified on that subject of his own knowledge.

Mr. Zimmerman: Do you mean to say that the witness has testified as to the contents of the invitations to bid and the specifications?

Mr. Wooden: These are things that pass over his desk and are a part of his duties to handle.

Mr. Zimmerman: Quite so.

Mr. Wooden: And even a business man has to act on reports received from subordinates and records that they collect and provide to him, and he knows in that way what is going on in his organization.

Mr. Zimmerman: But he has not testified as to the contents of the invitations to bid and the specifications in this particular case.

Mr. Wooden: I remember asking distinctly about all of these cases which they asked for, whether they asked for f. o. b. mill bids or destination.

Mr. Zimmerman: That would be asking him for his conclusion as to the contents of a written instrument, and I am sure you would not do that any more often than was necessary.

1185 Examiner Norwood: I think he can give information about all of these bids, what the rule is in their office about it.

Mr. Zimmerman: I should think that the simple thing to do to shorten the record would be to suspend with this witness until we get these records in form. Mr. MacIntyre has been in here, so that they could have called him if they wanted, but let us get these things not piecemeal but altogether.

Mr. Wooden: Mr. MacIntyre hasn't anything to do with this.

Mr. Zimmerman: I thought that you could have called him to testify on some other subject until you can get these things in shape.

Mr. Wooden: Until the production of the original documents which are called for and agreed to be produced, these things which are now offered are admissible.

Mr. Zimmerman: They may very well be, but I am going to protest against their going in evidence piecemeal.

Examiner Norwood: I shall receive them as Commission's Exhibit 111-A to F. If those records are open and some clerk has told you that they are not, I will see about it. It is saving us a great deal to put in the essen-

1186 tial facts here and leave out those voluminous records, and the Commission has heretofore ruled that such papers might be put in in the interest of economy and to expedite the hearings.

Mr. Zimmerman: I do hope that your Honor will forgive me for seeming persistent, but I really do not believe that the point of my objection has been made clear.

Examiner Norwood: I think it is perfectly clear.

Mr. Zimmerman: It is clear, is it, that this is not the complete transaction? It is clear, is it, that we cannot tell what kind of prices were asked for by the government without having before us the terms of the invitations and specifications?

Examiner Norwood: I do not know whether they are complete invitations or not, but it is the privilege of one side to put in one part of the transaction, and for the other side to put in the rest of it if they want to.

1187 By Mr. Wooden:

Q. I am now showing you some papers marked Commission's Exhibit 112-A to D inclusive. Will you state what they are? They were formerly part of the papers marked as Respondents' Exhibit 4.

Examiner Norwood: Exhibit 111 had a respondents' mark on it too, didn't it?

Mr. Wooden: Yes, sir.

Examiner Norwood: What was that?

Mr. Wooden: No. 2, I believe.

Mr. Leisure: Your Honor, we have never seen the Exhibits 1 and 3.

Mr. Wooden: I don't know what they are; whether they are a part of this collection or not, but that letter begins with No. 2. Off the record.

(Discussion off the record.)

Q. Will you repeat the question?

(The question is repeated.)

The Witness: These papers include a letter from the Acting Commissioner of the Bureau of Reclamation to the Secretary of the Interior regarding bids received on August 20, 1935, under specification 641 for Portland cement and Portland cement clinker for the Grand Coulee
1188 Dam Columbia Basin project, Washington, and an abstract of the bids received.

Mr. Wooden: I offer those papers for the record as Commission's Exhibit 112-A to D inclusive.

Mr. Leisure: We make the same objection as we did to the previous exhibit, your Honor, to apply at this time on all of these exhibts.

Examiner Norwood: Same ruling and conditions.

Mr. Zimmerman: Let the record show the same objection to those as to Commission's Exhibit 111-A to F, and I desire to point out that the witness has just referred to specification No. 641. That is quite simple; let us find out, are you going to have those things brought over here at a later time?

Mr. Wooden: Here is specification No. 641. It has been marked Respondents' Exhibit 5 for identification.

Examiner Norwood: It is not my understanding that they would be brought over here. They are available to you in those governmental offices. If they are not available, let me know.

1189 (COM. EX. 112-A to D was offered and received in evidence.)

Mr. Wooden: I now offer as Commission's Exhibit 113, what was formerly Respondents' Exhibit 5 for identification, consisting of specification No. 641.

Mr. Leisure: Same objection, your Honor.

Examiner Norwood: Received.

By Mr. Wooden:

Q. Mr. Taylor, do I understand that there were some papers relating to the bidding on the Grand Coulee project that came in between the bidding shown by exhibits 111 and 112?

A. Either between or before 111. As I recall, there were three cases.

Q. And were those cases here at one time?

A. It is my recollection that they were all identified here. There were three separate cases on the Columbia Basin.

1190 Q. Showing you papers marked Commission's Exhibits 114-A and B, Mr. Taylor, what are they (handing documents to the witness)?

Examiner Norwood: Have you tendered Exhibit 113?

Mr. Wooden: I thought I did. If not I will make a tender now.

Examiner Norwood: Is there any objection to Commission's Exhibit 113?

Mr. Leisure: The same objection.

(COM. EX. 113 was offered and received in evi-
1191 dence.)

A. This is a memorandum for the Commissioner.

Mr. Hershberger: Was that formerly identified as a respondents' exhibit or not?

Mr. Wooden: That particular paper bears no mark but it is a duplicate of one that was marked as a respondents' exhibit. We will get to that.

A. (Continuing). This is a memorandum for the Commissioner under date of April 12, 1934, prepared by me. The subject was bids received under invitation No. 38007-A for furnishing 16,000 barrels of Portland cement in cloth bags for the Columbia Basin Project, Washington.

By Mr. Wooden:

Q. Did you testify from such a paper when you appeared here before?

A. Yes.

Mr. Wooden: For the sake of clarification I will offer this with the statement that it is a duplicate of what was marked Respondents' Exhibit 1 for identification, and which is missing at the present time.

(COM. EX. 114-A and B was offered and received
1192 in evidence.)

By Mr. Wooden:

Q. I am showing you now, Mr. Taylor, papers marked Commission's Exhibits 115-A to G, inclusive. Will you

state what they are and what they relate to? (Handing document to the witness.)

Mr. Wooden: These papers are a part of what was formerly marked Respondents' Exhibit 6 for identification.

A. These papers include a letter from the Commissioner or the Acting Commissioner of the Bureau of Reclamation to the Secretary of the Interior dated March 12, 1935, regarding bids opened on February 10, 1936, on the specifications No. 766-D, covering cement for the Hamilton and Arnold Dams, Colorado River Project, Texas; also a memorandum for the Acting Commissioner signed by the First Assistant Secretary under date of March 19, 1936; also a memorandum for the Acting Commissioner under date of March 4, 1936, written by me; also a memorandum for the Secretary signed by the First Assistant Secretary under date of March 26, 1936; also a
1193 memorandum for the First Assistant Secretary signed by the Acting Commissioner dated March 25, 1936.

By Mr. Wooden:

Q. Do the papers include an abstract of the bids?

A. They include figures taken from the abstract but not the original abstract, not a copy of the original abstract.

Q. These are all photostatic copies, are they not?

A. Yes.

Q. From papers in the files of your Bureau?

A. Yes.

Mr. Wooden: I offer them for the record as Commission's Exhibits 115-A to G, inclusive.

Examiner Norwood: I shall ask the counsel for the Commission to see that it appears clearly on the record where and in what offices the respondents may find the original documents.

Mr. Wooden: I will be glad to have the witness state where they are available.

Examiner Norwood: Yes, and if he does not know, if counsel for the Commission will take it upon himself to give them that information later, I would like to have him do so.

Mr. Zimmerman: It might as well be on the record. The witness can tell us, can he not?

Mr. Wooden: Yes, I think so. May I say that I
1194 assume no point is made as to the distinction between these photographic copies and the originals of the documents of which they are photographs.

Mr. Zimmerman: Yes, sir, there is. I say there has been no foundation whatsoever laid.

Mr. Wooden: I think that is an exceedingly technical position to take in this day when photographic copies of documents are considered the equivalent, at least, of the documents of which they are photographs.

Mr. Zimmerman: I think that is true, but I think still there ought to be some foundation laid, and I do think still that they ought to have produced all of the documents that I understood were to be produced in order to clarify this whole situation.

Mr. Wooden: That is another point. I am with you on that.

Mr. Zimmerman: Well, I have no doubt we can get together on the whole transaction, and I think this represents one of those cases where it would have been perfectly simple for counsel, without disclosing any mystery about his case, to have said, "Well, here are these documents. Will you look them over and see what more there is, if anything, that I should need and we will get it." I will be glad to do that at any time.

By Mr. Wooden:

1195 Q. Will you tell us, Mr. Taylor, where the originals and where the basic material that forms the specifications and bids is available, where it may be seen?

A. I prefer to answer that question by saying that one of our counsel is here and can give that information better than I can, because he knows the conditions under which those bids may be examined.

Q. Is that Mr. Bergen?

A. Yes.

Mr. Wooden: Mr. Bergen is here. Do you want us to stop here to get an informal statement from him on the subject, or what?

Examiner Norwood: Well, go ahead. He can tell us later.

Mr. Zimmerman: Mr. Bergen can inform us of that, later.

Mr. Wooden: Yes.

Examiner Norwood: Did you offer commission's Exhibits 115-A to G?

1196 The witness identified Com. Ex. 116 (formerly marked Resp. Ex. 7-A) as a statement prepared by him for his own information regarding bids received under Specifications No. 766-D. That is the Colorado River Project, Texas, bids opened February 10, 1936. It shows bids received and conditions of the bidding. Those notations were in his handwriting. He testified from the document on the occasion of his previous testimony.

Mr. Wooden: I offer Commission's Exhibit 116 for the record.

1197 Mr. Leisure: The same objection, Your Honor.

(COM. EX. 116 was offered and received in evidence.)

By Mr. Wooden:

Q. What is the paper marked Commission's Exhibit 117 for identification and formerly marked Respondents' Exhibit 8 for identification?

A. This is a copy of Specifications No. 766-D, including invitation for bids, schedule of specifications, Portland cement for Hamilton Dam and Arnold Dam, Colorado River Project, Texas. Bids received on February 1198 10, 1936. This is a specification printed by the Bureau and sent to all prospective bidders.

Mr. Wooden: I offer it for the record. This is one of the papers that Mr. Zimmerman wanted produced.

Mr. Leisure: The same objection.

Examiner Norwood: Have you tabulated the results relating to that invitation? Is there any evidence here of tabulated results?

The Witness: Not the abstract of bids. That is the original abstract of bids but the papers do show the bid as received.

Examiner Norwood: Some of the exhibits show that?

The Witness: Yes.

Examiner Norwood: Which exhibits show that? I would like to know that. The one you last put in?

Mr. Wooden: No, the last was merely an invitation.

Examiner Norwood: Yes. Well, it was Commission's Exhibit 116. Commission's Exhibit 116 relates to this last paper, does it, this pamphlet?

The Witness: Yes.

(COM. EX. 117 was offered and received in evi-
1199 dence.)

Q. I am now showing you Commission's Exhibit 115-H for identification. What is that (handing document to the witness)?

Examiner Norwood: Wait a minute.

Mr. Wooden: I am going back to put a paper in the previous exhibit that was inadvertently left out.

A. This is a preliminary abstract of bids, Portland cement for Hamilton Dam and Arnold Dam, Specifications No. 766-D.

By Mr. Wooden:

Q. Does that relate to the same project and bidding that is now in evidence as Commission's Exhibits 115-A to G, inclusive?

A. Yes.

Mr. Wooden: I will offer it as a part of that same exhibit and say that it inadvertently got mixed up with part of Respondents' Exhibit 9 for identification.

Mr. Leisure: The same objection.

1200 (COM. EX. 115-H was offered and received in evidence.)

1201 Q. What are papers marked Commission's Exhibit 118-A, B and C for identification (handing papers to witness)?

A. (Examining papers.) These papers include a letter from the Acting Commissioner to the Secretary of the Interior dated April 13, 1936, concerning bids opened on March 20, 1936, under File No. 42,558-B for 7,000 barrels of cement for the Stewart Mountain Dam, Salt River Project. Also an abstract of the bids received, and apparently a copy of the invoice.

Q. What are papers marked Commission's Exhibit 119-A and B for identification?

1202 A. (Examining papers.) These papers include a letter to the Secretary of the Interior from the Commissioner of the Bureau of Reclamation dated April 21, 1937, regarding bids opened on April 9, 1937, under File No. 25,571-A, covering cement for the Caballo Dam, Rio Grande Project; also an abstract of the bids received.

Q. What are the two papers marked Commission's Ex-

hibit 120-A and B for identification (handing papers to witness)?

A. (Examining papers.) They include a letter to the Secretary of the Interior from the Commissioner of the Bureau of Reclamation dated May 14, 1937, regard-
1203 ing bids opened on May 3, 1937, under File No. 26,-019-A, covering 9,000 barrels of cement for the Truckee Storage Project, also an abstract of the bids received.

Mr. Zimmerman: That is a photostatic copy of the abstract?

The Witness: In all cases.

Mr. Wooden: I offer those for the record. It was formerly marked Respondents' Exhibit 11 for identification.

Mr. Leisure: We make the same objection.

Examiner Norwood: Received as Commission's Exhibit 120-A and B.

Q. What are the papers marked Commission's Exhibits 121-A, B and C for identification (handing papers to witness)?

A. (Examining papers.) They include a letter to the Secretary of the Interior from the Commissioner of the Bureau of Reclamation dated July 12, 1937, covering
1204 bids received on June 21, 1937, under Specification No. 934-D for 200,000 barrels of cement for the Marshall Ford Dam, Colorado River Project, Texas, together with a copy of the preliminary abstract of the bids.

Q. What is Commission's Exhibit 122 for identification formerly marked Respondents' Exhibit 13 for identification (handing papers to witness)?

A. (Examining papers.) This is the invitation for bids scheduled in Specifications 934-D, low heat Portland cement for the Marshall Ford Dam, Colorado River Project, Texas, bids opened June 21, 1937, which were sent to all prospective bidders.

1205 (COM. EX. 122 was offered and received in evidence.)

Q. What are the papers marked Commission's Exhibits 123-A, B, C and D, formerly marked Respondents' Exhibit 14 for identification (handing papers to witness)?

A. (Examining papers.) They include a letter to the Secretary of the Interior from the Commissioner of the

Bureau of Reclamation dated September 27, 1937, regarding bids opened on September 9, 1937, under Invitation No. 46,988-B covering 45,000 barrels of cement for the Marshall Ford Dam, Colorado River Project Basin, also a letter to the Commissioner of the Bureau of Reclamation from the First Assistant Secretary of the Department of the Interior dated October 7, 1937. Also a copy of the abstract of the bids received.

1206 Q. What are the papers marked Commission's Exhibit 124-A and B for identification, formerly marked Respondents' Exhibit 15 for identification (handing papers to witness)?

A. (Examining papers.) They include Specifications No. 977-D with invitation for bids and schedule covering low heat Portland cement for the Parker Dam, Parker Dam Project, California-Arizona, bids opened on October 13, 1937, which were sent to all prospective bidders. Copy of the abstract of bids received under that invitation.

(COM. EX. 124-A and B was offered and received in evidence.)

1207 A. (Examining papers.) They include a letter to the Secretary of the Interior from the Commissioner of the Bureau of Reclamation dated February 3, 1937, covering bids opened on January 7, 1937, under Invitation 2272-C, covering bids for the Carlsbad Project, New Mexico, also an abstract of the bids received under that invitation.

Mr. Wooden: I offer these papers for the record with the explanation that this is an additional project or purchase than the ones which were marked Respondents' exhibits for identification.

(COM. EX. 125-A and B was offered and received in evidence.)

Q. Now, Mr. Taylor, will you take these remaining papers that were formerly marked as Respondents' Exhibits up to 15, beginning I think with 1, and state in which instances the invitations to bid are here now?

1208 Mr. Leisure: Where are they? I have not seen them.

Mr. Wooden: He has them now. In other words, they were part of the papers that you had.

Mr. Zimmerman: May I ask a question off the record?

(Discussion off the record.)

The Witness: These papers are apparently copies—

By Mr. Wooden:

Q. Are they photographic copies?

A. Yes. Photostatic copies of the bids made by Washington cement companies.

Q. On what project?

A. On the Columbia Basin Project, Washington. I believe Specification No. 641. They were offered on August 20, 1935. Yes, it was under Specification No. 641.

Q. The other papers relating to it are Exhibit 112-A to D, inclusive?

A. Yes. These papers are copies of the bids received, or some of the bids received.

Q. Do they include the invitations to bid, also?

1209 A. The invitation is in the specification.

Q. That is Exhibit 113, is that correct?

A. Yes. There are also here copies of vouchers covering cement purchases under that specification.

Q. Were those papers formerly a part of Respondents' Exhibit 4 for Identification?

A. Yes.

Mr. Wooden: On this case we have already proven the invitation to bid and the photostatic copy of it, and the copies of the original bids, and I am making them available to Mr. Zimmerman in view of his objection.

1210 A. These papers are copies of bids received, or some of the bids received under Specifications No. 766-D.

Examiner Norwood: Are those the papers marked 127. for identification?

Mr. Wooden: No, these papers that he refers to were formerly part of one of the respondents' exhibits, Exhibit 6 for identification. I am not offering them, Your Honor, I am just merely undertaking to satisfy Mr. Zimmerman, as far as possible at this time that the material that he has been calling for is already here.

The Witness: As I said, these are copies of some of the bids received under Specifications 766-D, cement for the Colorado River Project, Texas, bids opened February 10, 1936.

By Mr. Wooden:

Q. And covered by Exhibit No. what?

A. Exhibit 115-A to H. The invitation for bids is in the specifications.

Q. They are already a part of the exhibit?
A. Yes.
Q. Now will you take up the next one?
A. This is a copy of the invitation, bid and acceptance, short form contract.
Q. What was that project?
A. Sent to all prospective bidders under Invita-
1211 tion No. 42558-B cement for the Salt River Project, Arizona, filled in by the Pacific Portland Cement Company. It is their bid, made on this standard Government Form No. 33.
Q. And to what exhibit does it relate?
A. I might add that there is also a copy of the voucher, and it relates to exhibits 118-A and B.
Q. What is the next?
A. This is a copy of the invitation, bid and acceptance, short form contract; invitation No. 25571-A; cement for the Caballo Dam, Rio Grande Project, New Mexico, filled in by the Southwestern Portland Cement Company. It is their bid, on that standard form. Also there is a voucher.
Q. And to what exhibit do those papers relate?
A. 119-A and B.
Q. Were those papers formerly part of respondents' Exhibit 9, for identification?
A. Yes.
Q. All right. What next do you have?
A. This is a copy of a voucher of the United States to the Southwestern Portland Cement Company.
Q. Do you have the invitation number?
A. I do not tie it up with any of our invitations.
Q. All right, we will pass it by. What is the next?
A. This is an invitation, bid and acceptance, short form contract on standard Form No. 33, Bureau of
1212 Reclamation invitation 26019-A, covering cement for the Truckee Storage Project, Nevada-California; bids opened May 3, 1937. It was filled out by the Cowell Portland Cement Company of San Francisco, California. It is a copy of their bid.
Q. And that relates to what exhibit number?
A. 120-A and B.
Q. What is your next?
A. Well, this appears to be part of a copy of a bid.
Q. Does it relate to any of the projects?
A. It relates to the Colorado River Project, Texas.

Q. Was that invitation on Specifications 934-D?

A. It does not show.

Q. Look at Exhibit 121-A, B and C and state whether the papers relate to that exhibit?

A. Presumably they do. The amount of cement is the same but I can not identify it by specification number.

Q. Have you stated what the papers are?

A. Apparently a copy of a part of the bid for cement for the Colorado River project, Texas, but it does not show the cement company nor the invitation number.

Q. What next do you have?

A. This is a copy of the standard Government form of bid, supply contract, cement for the Colorado River Project, Texas; bids opened June 21, 1937, and is apparently the bid of the Trinity Portland Cement Company.

1213 Q. Do you have the invitation number on those papers?

A. No.

Q. Can you say whether those papers relate to the same project as covered by Commission's Exhibits 123-A to D, inclusive?

A. No; there is a notation on one of these papers, Specifications No. 934-D. It is not in the copy, it is marked on the copy. These papers also cover a bid by the Republic Portland Cement Company.

Q. Do they relate to any exhibit that we have, or that we have had on this matter?

A. They relate apparently to Specifications No. 934-D, but I would have to see those specifications before I could tie up these papers with them. The opening date is June 21, 1937.

Q. Do they relate to the papers in Commission's Exhibit 121-A, etc.?

A. Yes.

Q. All right. What next have you?

A. This is an invitation, bid and acceptance, short form contract, U. S. Standard Form No. 33, Invitation No. 46988-B; cement for the Colorado River Project, Texas; bids opened September 9, 1937.

Q. What exhibits do they relate to?

Examiner Norwood: You asked him with regard

1214 to the new paper that you just handed him?

Mr. Wooden: Yes.

Examiner Norwood: All right.

A. They relate to 123-A to D.

By Mr. Wooden:

Q. All right. What next have you?

A. This is a paper with which I am not familiar.

Q. All right. I think it got in there inadvertently. It is just some compilations of freight rates. What next have you there?

A. This is a copy of the invitation, bid and acceptance, short form contract, U. S. Standard Form No. 33, invitation No. 2272-C; cement for the Carlsbad Project, New Mexico. It was filled in by the United States Portland Cement Company of Denver, Colorado. It is a copy of their bid under that invitation, together with a voucher covering the purchase.

Q. And they relate to what exhibit?

A. 125-A and B.

Mr. Wooden: Your Honor, this somewhat tedious process has been the result of an effort to satisfy Mr. Zimmerman that at least photographic copies of most of the documents which he insisted should be made available are here now and are available to him.

Mr. Zimmerman: Well now, it has not been possible for me to follow the questions and answers that have
1215 been just propounded and answered in regard to these documents lying here on the table. I think I shall have to first ask that that entire colloquy be written up, or read so that we can perhaps discover whether we can make head or tail out of it. In the meantime I should like to ask Mr. Taylor a few questions to see, perhaps, if I can clear it up.

Mr. Wooden: All right.

Examiner Norwood: It appears in the record that the documents relate to specified exhibits there and probably counsel can look at all of them.

Mr. Zimmerman: I am not quite clear as to that.

Examiner Norwood: After referring to the record.

By Mr. Zimmerman:

Q. Let me ask you, Mr. Taylor, if you were given an afternoon to do it would you be able to produce the entire file on each one of the Commission's exhibits, we will say, from 111 onward that you have testified concerning this morning? If given time to do it could you produce the entire file segregated as to each exhibit?

A. The original files?
Q. Yes, sir.
A. I could not produce them, no.
Q. Why not?
A. You would have to get permission from the
1216 Secretary of the Interior to do it.
Q. Waiving that for the moment, I mean could you assemble them in your office ready to be produced? Is that physically possible?
A. Oh, yes.
Q. You could do that if you were given an afternoon in which to assemble all of those papers? You could get together a complete file on each one of these exhibits, could you not?
A. Except for the bids.
Q. Why not the bids?
A. We do not have them.
Q. You do not have the bids?
A. No.
Q. Where are they?
A. We only have a copy of the contract with the successful bidder.
Q. Well, where are the bids?
A. As I told Mr. Wooden, I would prefer to have that question answered by Mr. Bergen who is more familiar with the location of the bids and the availability of them. That does not come within my province.
Q. Well, suppose you confine your answer to not telling me where they are at the moment, but do you know where they are, of your own knowledge?
1217 A. I could not say that.
Q. You have then, thus far, made no effort to assemble all of the documents relating to each of the bids that you have testified to here? Maybe my question is not plain.
Examiner Norwood: Read the question.
(The question was read.)
Examiner Norwood: Answer the question.
A. The documents to which I have testified were furnished by Mr. Rothbard and not by myself.
Mr. Zimmerman: I think that is helpful. I do not want to be impatient at all. Take all the time you want; but I do think you have not quite given me an answer to my question. Would you mind reading it to him once more, Mr. Reporter?

Examiner Norwood: Have you made any effort to assemble these papers?

The Witness: No, because I was not asked to.

Mr. Wooden: This witness is an engineer. The matter of assembling and providing the records remains with the legal division, of which he is not a part.

I would like to say further we have made available here, in these papers, photographic copies of the very things which Mr. Zimmerman has been asking for and making considerable point of the fact that they apparently were not available. I have been going through this tedious
1218 process of showing that they are not only available but that they are here and have already been produced in the form of photographic copies.

Mr. Zimmerman: Counsel will pardon me if I disregard his testimony. What I am trying to do is to get the testimony of the witness. It is not that I have any objection to counsel's statement, but I can not accept it as being complete.

Examiner Norwood: I think the testimony of all the counsel should be disregarded.

Mr. Wooden: My understanding is that the General Accounting Office has the copies or, perhaps, even the original bids.

Mr. Zimmerman: Yes, sir.

Mr. Wooden: But some bids are kept at field offices. I do not know whether I am correct in that or not. Am I, Mr. Taylor?

The Witness: I could answer that to the best of my knowledge but I would prefer to have that answered correctly by Mr. Bergen.

By Mr. Zimmerman:

Q. Well, give us your knowledge on it. I understood you were called here as a witness because you were very familiar with all of these transactions. They passed across your desk and through your hands, and I understood
1219 that you knew all about them. Now if that is not a fact tell us so.

Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Zimmerman: Will you read my question, Mr. Reporter?

(The question was read by the reporter.)

A. I am familiar with all the engineering details regarding these purchases of cement, the specifications, the invitation for bids, and so forth. After they leave my hands the cases are handled by the legal department of the Bureau and I have nothing more to do with the different purchases.

By Mr. Zimmerman:

Q. Your knowledge then does not go—

A. (Interrupting). Well, I can not tell you. I do not want to give you any incorrect information as to the availability or location of the various bids.

Q. I would not want you to, I only want you to give us the benefit of your knowledge, so far as it goes, and that is all. Do I understand that what you have produced here you had no part in selecting at all but they were all selected by Mr. Rothbard of the Legal Division?

A. The papers were all gathered by Mr. Rothbard for photostating.

Q. You do know, however, that they were just carefully selected in some way, they were not intended to be
1220 the complete record of all the bids on any particular project, were they?

A. Oh, no, they were representative purchases.

Mr. Wooden: Just a moment. I do not want it confused. Are you speaking of the bids on representative projects while Mr. Zimmerman is speaking of all the bids on the particular project?

Mr. Zimmerman: I think that is right, Mr. Wooden. I think that is what I did.

Mr. Wooden: I thought he misunderstood you, from his answer.

Mr. Zimmerman: Perhaps he did.

The Witness: I will say this, that as far as my best recollection is concerned, these papers cover all bids received, say, on the Columbia Basin Project in Washington for cement, all bids received for cement on the Colorado River Project in Texas, but probably not all bids received for cement on some other projects.

By Mr. Zimmerman:

Q. Well now, let us take the Columbia Basin Project, for example. Can you now hand to me, or point out to me all of the papers on the Columbia River Basin Project, that is, all of the bids, specifications, the invitation to bid, the

correspondence to and from bidders about the manner of bidding, and, in fact, the entire file on that Columbia
1221 River Basin Project bidding? Can you point out those things and lay them out here for us now?

A. Not the entire correspondence regarding those purchases, no.

Q. Or all of the bids?

A. All bids?

Q. Can you give us all the bids on that project right here and now?

A. Well, you are asking for quite a lot.

Q. I understood you to say they were here.

A. The cases that I have testified to are all the purchases made by the Bureau for the Columbia Basin Project.

Q. Now I understood you to say that you had all of the bids on the Columbia River Basin Project here.

A. The bids?

Q. Yes. Did you not so testify?

A. No.

Mr. Zimmerman: Let us see the record on that.

The Witness: A copy of the bids but not the bids.

By Mr. Zimmerman:

Q. Have you got copies of all of the bids here?

A. All that were shown to me, yes.

Q. Not all that were shown to you by somebody else, but all that were made on that project, or received.

Mr. Wooden: I did not pretend to indicate that he
1222 had here copies of all the bids.

Mr. Zimmerman: But he said he did.

Mr. Wooden: There are copies of some bids. There are copies of all the invitations to bid; there is an abstract of all the bids.

Mr. Zimmerman: But we can not tell a thing about the abstract without the bids themselves. There is no reason that I can see why we should not have them all here.

Mr. Wooden: There is no reason outside of the tremendous task of getting together and bringing them perhaps from different sections of the country, and all that sort of thing.

Mr. Zimmerman: I do not know about that.

Mr. Wooden: Well, that is my understanding of it. While there is a set, as I understand it, in the General Ac-

counting Office, there should not be any effort and I hope there is not any implication that there is any thought here of holding out anything on this project.

Mr. Zimmerman: By no means: I will disabuse your mind in the record on that immediately. It seems to us that we are a little bit at a disadvantage, that is all, Mr. Wooden. Your office has undoubtedly gone through a great mass of detail and have selected from that certain things. We can not tell what the true picture is with-

1223 out having the record.

Mr. Wooden: We are perfectly willing to take the record, without plowing through all the bids for the basis of the abstract.

Mr. Zimmerman: He said he had the original bid here, did he not?

Mr. Wooden: No, he has not said he had the original bid here.

Mr. Zimmerman: He said so.

Mr. Wooden: If he did that is up to him; I do not know.

By Mr. Zimmerman:

Q. Well, have any of the bids been destroyed, as you know?

A. I would not know about that.

Q. Who would know?

A. The Commissioner and the Bureau.

Q. Well, who?

A. Mr. Page.

Q. Is he the only one that would know?

A. He would be the proper one to get that information from.

Q. Well now, you said from time to time here to Mr. Wooden that you could not identify some of these papers without seeing the specifications. What did you mean by that? I want to see how we are going to proceed if you could not identfy those papers without seeing the specifications.

1224 A. The papers without a specification number or an invitation number.

Q. Well, do you have here all the specifications? I do not mean each one that you sent out, but do you have here one specification for each and every one of these bids or projects that you testified about?

A. I would have to check through to see. There are several specifications and invitations in those exhibits.

Q. But they are not complete?

A. I would not be sure, or I can not tell, because I do not remember all the cases.

Q. I am referring only to those that you testified about.

A. Well, you would have to give me time to examine the papers again.

Q. I am perfectly willing for you to do that.

A. I can get copies of any invitations that are not there, or specifications that are not there.

1225 By Mr. Wooden:

Q. In that connection, are there certain rules that are imposed upon the giving out of information, by order of the Secretary?

A. Yes.

Q. How long standing have those rules been?

A. Since August, 1915.

Mr. Wooden: I do not care to offer them for the record at all, but just for the information of counsel.

Mr. Leisure: Is that the Secretary of the Interior?

Mr. Wooden: That is what I understand.

1226 Mr. Leisure: I do not feel that the burden should be placed upon us to go around and get the consent of the Secretary of the Interior, to get his personal consent on evidence that is being offered against us here. Either it is properly admissible or it is not properly admissible, and that is the burden that I do not feel should be placed upon us.

Mr. Wooden: I was not seeking to put it upon you. I was seeking merely to respond to the statement that was made that there was an outright refusal.

Examiner Norwood: I have already undertaken to see that respondents' counsel get access to the original documents, and in cases that he cannot, I shall consider withdrawing the exhibit from evidence or not considering it, and that is understood that they have their exception on all of this testimony of this nature. I think that will enable us to go ahead.

Mr. Wooden: I ask to have these papers marked Commission's Exhibit 126-A, B, C, and D for identification.

(The papers were marked "Commission's Exhibit 126-A, B, C, and D for identification.")

By Mr. Wooden:

Q. Mr. Taylor, referring to the bids on the Grand Coulee project in August, 1935, was that the occasion on which you asked for bids for clinker?

1227 A. I am not sure about the date without referring to the papers.

Q. (Handing papers to witness.)

A. (Witness examining papers.) Yes.

Q. What was done in the Department with regard to those clinker bids? How were they considered, and what action was taken on them?

A. The clinker bids were rejected as being too high, and award was made for the cement. The clinker bids were asked on a ton basis, but when that was reduced to a barrel basis, the comparison with cement was only 12 cents a barrel difference.

Q. What was the effect of that difference upon the ability of the Bureau to consider the acceptance of clinker bids and the grinding of its own cement?

Mr. Leisure: I object to what was the effect. This is clearly cross examination of his own witness, and I object to the question as incompetent, immaterial and irrelevant.

Mr. Wooden: I do not see anything in the nature of cross examination.

Examiner Norwood: Read the question.

(The question is read.)

Examiner Norwood: I do not think he is suggesting any effect in that question. Objection overruled.

1228 The Witness: The fact of the clinker bids being high, considered high, and the cement bids being considered low and reasonable, the effect was to show the Bureau the unfeasibility of considering the construction of a processing plant.

By Mr. Wooden:

Q. Was that the occasion when the bids on cement were approximately 75 cents a barrel lower than they had been before?

A. Yes.

Q. What are the papers marked Commission's Exhibit 126-A to D inclusive? (Handing papers to witness.)

A. (Witness examining papers.) These papers are a letter from the Acting Chief Engineer to the Commissioner dated August 23, 1935, regarding bids received under

specification 641 for Portland cement and Portland cement clinker for Grand Coulee Dam, Columbia Basin project.

Q. Do these in part represent the basis on which you Bureau acted in deciding its policy with regard to the grinding of its own clinker after purchasing it?

A. As far as these particular bids were concerned, yes.

Mr. Wooden: I offer the papers for the record.

Mr. Leisure: We object to Exhibit 126 on the ground that it is incompetent and irrelevant. This is a communication between different departments of the govern-
1229 ment. The author of the letter is not being called; there is a considerable story connected with this asking for clinker. It is my information that the real reason for this difficulty was that the government was asking for a special cement called Puzelon. It seems to me we should have the opportunity of cross examining the author of a letter, that a letter should not be just offered in evidence here because it is found in some governmental file. We should be able to bring out the facts in connection with the writing of a letter. I do not think a proper basis has been laid for offering it through this witness, and therefore we object to it.

Mr. Wooden: We offer it on the basis of the statute which has been mentioned here before, as a part of the official records of the Department, made in the regular and ordinary course of its handling of its business affairs.

Mr. Leisure: Let me say, for the purposes of the record, that the statute cited has no application whatever to this kind of an exhibit.

Mr. Wooden: That is a matter of argument.

Examiner Norwood: Who is the letter from? Let me see it. (Examining letter.)

Does that letter tie in with the rest of the ex-
1230 hibit?

Mr. Wooden: Yes, it relates to another exhibit here for bids on clinker and on cement for that Grand Coulee Dam project.

Examiner Norwood: This was a letter that passed between departments in the due course of business from the Acting Chief Engineer to the headquarters here, as I understand it?

Mr. Leisure: Your Honor, it is offered, I take it, for proving the truth of the declarations contained in the letter.

That being so, the author of the letter not being called, it is clearly hearsay.

Mr. Wooden: I think I can assure you that before we are through, we will have the author of the letter.

Mr. Leisure: Then why don't we just mark it for identification and save time?

Mr. Wooden: I think it is admissible regardless of that.

1231 *Cross Examination by Mr. Leisure.*

Q. Mr. Taylor, I only want to ask you a few questions. In your testimony on the direct, you had a sheet, as I remember it, on which you described certain bids. I want to know if that sheet that was offered in evidence covered all of the bids or just certain selected bids?

A. It covered all of the important purchases for that period. There were some small purchases, as I recall, say two or three hundred barrels at a time that were purchased during that period under the same conditions, but I did not list those. I have that sheet here if you wish it entered.

Mr. Leisure: I think it would be very well to mark it.

The Witness: (Producing paper.) I think this is the one you have reference to.

Mr. Leisure: I hold in my hand a sheet tendered to me by the witness purporting to show bids between the dates of March, 1927, and April, 1936, which I now ask to have marked for identification.

(The sheet was marked "Respondents' Exhibit 17 for identification.")

By Mr. Leisure:

Q. Now, in discussing these bids, I realize, Mr. Taylor, that it has been some time since you gave your tes-
1232 timony, so if you do not understand my questions, do not hesitate to ask me what I mean, without answering unless you know. You said last week that some of those bids were irregular because of the control clause, is that right?

A. (Examining paper.)

Q. I am just talking about your testimony. Do you recall that?

A. I don't recall that that referred to these particular bids.

Q. No, I am not referring to that exhibit. I dropped that and went on to your testimony, and that is why I made the statement that I did make. Certain bids were regarded by your Department as irregular?

A. Yes.

Q. Because they had this control clause?

A. Yes.

Q. Isn't that so?

A. Yes.

Q. Well, there is nothing unusual about control clauses? The government has a control clause in its invitations, has it not?

A. No, not the control clause that we refer to.

Q. Not the same one, but you have a control clause specifying how the bids are to be, if land-grant rates are to be applied, have you not? Let me read to you

1233 what you said on page 246 of the record: "It gives the government the privilege of shipping on government bill-of-lading and deducting from a destination bid the commercial and adding the land grant or special rate." Isn't that so?

A. Yes. In our specifications that is a standard paragraph, paragraph 8, I believe it is.

Q. It is a standard paragraph, isn't it?

A. We reserve the right to ship on government bill-of-lading and deduct, and so forth.

Q. Now, the control clause that the shipper uses is also for the purpose of giving the government the benefit of the land grant or any special rate, isn't that so?

A. No.

Q. What is it?

A. As we understand it, it prevents us from having the benefit of land grant rates.

Q. Yes. Now, I understood you to testify to that last week, and that is just what I would like to have you explain. Will you explain to his Honor just how our control clause prevents you from having the benefit of the land grant or any special rate?

1234 A. Well, in a few words, the control clause specifies that to determine the mill price we shall deduct from the destination bid the commercial rate, the land grant rate or special rate, whichever is the lowest.

Q. Whichever is the lowest?

A. Yes.

Q. Our control clause allowed you the advantage of whichever rate is the lowest, is that not so?

A. Not the advantage.

Q. Strike that word out.

A. To determine the mill price.

Q. It allows you to take whichever is the lowest, does it not, to deduct whichever is the lowest?

A. Which allows us to deduct whichever is the lowest?

Q. Yes, sir.

A. We of course have to determine the lowest net delivered cost to the Government to find—

Q. (Interrupting): Delivered at the point of destination?

A. —to find the low bidder.

Q. Yes. So that you feel when the control clause allows you to deduct whichever one is the lowest that that deprives you of the benefit of the land grant rate, is that what you meant when you said that?

A. We feel that the control clause prevents us from having the benefit of the land grant rates.

1235 Q. And is that because, as you have explained, because it gives you the right to deduct the lowest?

A. In our invitation for bids and specifications we reserve the right to deduct the commercial freight rate.

Q. That is right. And, as we pointed out the other day, when you deduct the commercial rate and also deduct the land grant rate it gives you the benefit of the land grant rate twice, do you remember that?

A. Yes, but I would like to have that explained to me very carefully before I believe it.

Q. You agreed to it the other day when you pointed it out.

A. I do not think so.

Mr. Wooden: That was Mr. Fry.

Mr. Leisure: Maybe it was Mr. Fry, yes.

The Witness: I do not think so.

By Mr. Leisure:

Q. I am not in a position of pointing out to anything in arguing my case to you, I must ask for information from you, but that is why you believe that you do not have the advantage of the land grant freight rate, or any special rate, when you use our control clause, is that right?

A. That is correct.

Q. And that is what you meant when you said these bids were irregular? You did not mean anything else, did you?

A. Irregular because they did not conform to
1236 the specifications.

Q. And they did not conform because they had a control clause?

A. Any bid that does not conform to the specifications is an irregular bid.

Q. Is irregular?

A. Yes.

Q. When you said these were irregular you had reference to the fact that they had a control clause?

A. They did not conform to the specifications.

Q. Yes, you said that. That is correct. Now in regard to the Olympic and Calaveras you said that they were irregular because they contained a control clause, and I am sure you want to correct the record if that should be a mistake.

(Documents were handed to the witness.)

Q. (Continuing): Is it not a fact, Mr. Taylor, that those two bids did not contain a control clause?

A. I would have to refer to our abstract of bids to be sure of that. I see the net here (indicating).

Q. If we have evidence later to substantiate that you will not dispute it?

A. That is possible, yes.

Q. Now you realize that the cement code under the N. R. A. provided for a control clause, do you not?

A. No.

1237 Mr. Wooden: Your Honor, I think counsel is mistaken.

Mr. Leisure: Is that all wrong?

Mr. Wooden: Yes.

By Mr. Leisure:

Q. I mean the filing of prices which permitted bidders to meet competition under the control clause. Let me put it that way.

A. The code provided for the cement companies filing prices, but as to competition I would not say.

Q. Well, if the code provided for it and one competitor, or one shipper, or one mill used the control clause it seems fairly reasonable that they would all use it, does it not?

A. Well, we got all kinds of bids under the code.

Q. And this was principally during the code period, these bids that you have been talking about, I think?

A. We got bids all ways.

Q. Now when you were considering these bids, and your testimony, did anyone point out to you that the code also provided, the cement code under the N. R. A., that it also provided for an open price plan?

A. You mean by that filed prices and destination bids?

Q. Filed prices, not destination bids.

A. Filed prices where?

Q. The prices of any cement concern.

1238 A. At a certain point?

Q. What?

A. At the mill or at a certain district or point?

Q. I am not talking about any special prices, I am talking about the code providing for an open price.

A. The code, as I understand, provided for filing prices.

Q. That would make it open, would it not, so that one competitor would know what the other competitors' bids were?

A He would know what his filed price was, yes.

Q. What his filed price was?

A. Yes.

Q. Don't you think, Mr. Taylor, that under any system where the prices were filed that that would tend to create identical prices?

A. At destination?

Q. In any open price plan.

A. Would tend to make identical destination bids, do you mean?

Q. It would tend to make the prices the same. If one man knew what the other man's price was he would not be so foolish as to offer a higher price and expect to have his bid accepted?

A. Well, it resulted in our case in getting usually identical bids at destination.

Q. That is right. Have you ever read the Wheeler hearings, the expert witnesses there both in the Gov-

1239 ernment and out more or less agreed that that would tend to produce similar prices? Are you familiar with that hearing?

A. Under the code?

Q. Under the code. When prices are filed, open prices are filed that tends to produce identical prices?

Mr. Wooden: Your Honor, I have not objected to this line of questioning, and I do not really care to now, except to point out that it is beyond the scope of the witness' direct examination, and, in fact, beyond the scope of his knowledge on the subject.

Mr. Leisure: I do not think it is beyond the scope of the direct examination. They offered certain bids here that were identical, during the code period. Now I assume they were offered for some showing against us because they were identical. I am trying to unfold for Your Honor how they can be identical in other ways, other than the charges in the complaint.

Mr. Wooden: Most of them, Your Honor, are subsequent to the code period.

Mr. Leisure: I remember asking him about the code period.

Examiner Norwood: This witness was testifying as to the facts, the facts surrounding these bids and the facts concerning these bids, and so on. I do not think his opinions as to these results were elicited at all, 1240 but if you want to test his knowledge about these bids you may go ahead. This is more or less of an argument here.

By Mr. Leisure:

Q. Now, Mr. Taylor, in those cases where the control clause is used, or where the land grant freight rate is used, I mean,—strike out the control clause,—then the Government is not deprived of the benefits of that rate, is it?

A. May I have your question again, please?

Q. Well, I will put it in another way. In other words, if the bid is made on the basis of the land grant freight rate and that is already deducted in the bid then the Government is not deprived of the land grant freight rate, whether there is a control clause there or not, is it? I mean included in the bid.

A. We do not know whether the cement companies include land grant rates or not. We do not know how they figure their bids.

Q. No, but you did not answer my question. I did not give you any particular case. I asked you if it were true that if the land grant freight rate were deducted—included, why then the Government is not deprived of the benefit of it, if it accepts that bid, in any case?

A. Unless there is a special rate which is lower than the land grant rate.

1241 Q. That does not answer my question. I would just like to know whether or not you feel that the Government is deprived of the land grant freight rate if it is included in the bid, if the Government should accept that bid?

A. The Government is deprived of the land grant rate, according to our specifications, if there is a special rate which is lower than the land grant rate.

Q. I did not give that hypothetical question. If you want me to give you that I will say, if it included the land grant rate and the special rate, if they were both included in the bid, then if the Government accepted that bid it would not be deprived of the benefit of either of those rates, would it?

A. If the bid made by the cement company included the exact land grant rate as computed by the Government?

Q. Yes, and the exact special rate as computed by the Government, and, after all, the Government always has the last say, does it not?

A. They should.

Q. They do, do they not?

A. Yes.

Q. And the Government is always right; however they figure it, they are right, and the seller is wrong, is that not true?" The Government has the last word, the seller has no come back?

A. No, any cement company can figure land grant rates for themselves.

1242 Q. Yes, but the Government has the last word?

A. I might answer that by saying that no two people will figure land grant rates alike, possibly.

Q. That is perfectly true, but however that may be, and however much the shipper may protest, whatever the Government says he has to accept it?

A. The Government makes the award, yes.

Q. The Government is always right, no matter how many accountants have figured it, the Government is the one that prevails?

A. I will not say they are always right; they have the last say.

Q. As far as the shipper is concerned?

A. Yes.

Q. He has to accept it?

A. Yes.

Q. Now cement is not the only industry that has to figure land grant rates, is it?

A. We use land grant rates wherever possible, on all purchases.

Q. On all purchases by the United States Government?

A. We are obliged to, yes.

Q. And the cement industry is not the only industry in your experience that submits identical bids on many jobs to the Government, is it?

1243 A. Well, I say they are the worst offenders that we have in that respect. We get identical bids on a few other commodities.

Q. Now when you say "worst offenders" you mean by that that there is something offensive about identical prices, is that what you mean?

A. No, I do not mean that at all. I mean that probably the cement companies have given us more identical bids than any other commodity.

Q. There is no innuendo on the words "worst offenders"?

A. No.

Q. Now you said a few moments ago—I want to point out to you from Secretary Ickes' testimony, page 287, where he says, "The following list will give you some idea of the scope of materials and equipment, among others, on which identical bids have been received." You will observe that that is quite a list, instead of being just a few (indicating).

Mr. Wooden: If he will confine his testimony to what he knows in connection with his duties as a Bureau of Reclamation man, all right.

Examiner Norwood: Yes.

A. Practically all of these items we do not purchase as a general rule,—possibly in some small quantities that do not come to my attention. Reinforcing steel, we do purchase a large amount of that and we do get identi-

1244 cal bids at times. Some electrical equipment. Cable is one of the items that I recall. But there is a large amount of purchasing that is handled directly by the Denver office, amounts involving under $10,000, that do not come in here. What I am familiar with is merely the larger purchases that come to the Washington office, and there are only a few cases where there are identical bids.

By Mr. Leisure:

Q. But from looking at that list of 40 or 50 names there you have no doubt that there are many industries that have submitted identical bids to the Government?

Mr. Wooden: It might be observed that the Secretary was contending that all those cases were collusive in character.

The Witness: That is apparently true.

Mr. Leisure: I am glad to have that statement in the record.

The Witness: That is apparently true, from this testimony.

Mr. Leisure: At any time identical bids are submitted the contention is by the Government that they must be collusive.

By Mr. Leisure:

Q. Have not you had some non-identical bids on cement, Mr. Taylor?

1245 A. Oh, yes, during the code and before the code, and after the code.

Q. And you have had some f. o. b. mill bids for cement, have you not?

A. Before the code practically all bids were f. o. b. mill. We asked for bids f. o. b. mill and received bids f. o. b. mill. During the code we asked for bids f. o. b. mill and did not receive them, except in a few cases, and after the code we received them both ways.

Q. Now I do not know whether we have completely dispelled this atmosphere of secrecy about land grant freight rates or not, but I would like to discuss it with you a moment. When you first started to testify I got the impression, from both your answers and from the questions put by the attorney for the Commission, that you both felt that there was some great secrecy about land grant freight rates.

A. Well, it is the policy of the Government departments not to divulge Government land grant rates, and land grant rates were in these papers, and of course I was hesitant to—

Q. (Interrupting.) That is why we were having some difficulty about giving them up.

A. —I was hesitant to read them, and I got permission

from the Secretary's office to allow the land grant rates to go in.

Q. Now do land grant rates apply to the public
1246 carriers which are subject to the I. C. C.? They do, do they not?

A. Well now, you are getting into some questions as to freight rates which I possibly should not answer.

Q. This is cross-examination, and you are perfectly willing to tell me whatever you know, are you not?

A. These freight rates, as I testified to, are determined entirely by the Denver office, by a traffic clerk in that office, and they come in here and we take them as correct, because we have no way of disputing that traffic division.

Q. That is right, and you stated that very fairly and honestly, I think, on direct.

A. Yes.

Q. I now would like to go further and direct your attention to some other things about land grant rates.

A. As to land grant rates and their application, I am not qualified to testify to that.

Q. Your answer is you do not know whether they apply to these common carriers?

A. I have never gone into the question of land grant rates, except as they affect bids on materials by the Bureau.

Q. All right. Now confining your answer to that, then, do you know the origin of land grant freight rates in this country?

A. Yes.

Q. Just tell us for the record, please.

1247 A. These rates are granted the Government by railroads to whom lands were granted in the olden days.

Q. They entered into contracts with the railroads in the early days and part of the consideration was these freight rates, is that not right?

A. That is right.

Q. Now can you tell us any other case that you know of in which one side of the contract is a secret, where it is secret to one side, can you tell me of any other case where a contractual relationship exists between a railroad and the Government and part of the obligation is secret to one side of the agreement and not known to the other

side? Do you know of any such instance in any contractual relation?

A. Where one part of the agreement is not—

Q. Where one party to the agreement has part of the agreement kept secret from it.

A. From one of the parties?

Q. Yes, one of the parties to the agreement.

A. Well, I do not recall any case right now.

Q. It would be impossible, would it not, Mr. Taylor, to have a contract between two parties with one party not knowing what the obligations were that he was supposed to live up to?

Mr. Wooden: Let us have an understanding as to who these two parties are.

1248 Mr. Leisure: To be exact, between the railroad and the Government.

Mr. Wooden: There should be no secret about it.

A. Let me answer that by saying that the land grant rates are not kept from any railroads by the Government, the cement companies or anyone else. They are available to everybody.

By Mr. Leisure:

Q. That is what I thought.

A. You can figure them as well as we can.

Q. That is right. Can you imagine a carrier in the business of carrying goods that would not be glad to try to figure out the freight rate for a prospective shipper, if he wanted to know?

A. Land grant rates? Is that your question?

Q. I just say can you imagine a railroad that would not be glad to figure out the freight rate for the shipper if he wanted to ship over its road? Railroads have plenty of competition, do they not?

A. Yes.

Q. Yes. Would not it be natural that when a prospective shipper comes around that they would want to figure out his freight rate for him?

A. I presume they do figure it.

Q. Now there is difficulty about these land grant
1249 freight rates. Different people figure them differently, is not that so, Mr. Taylor?

A. Yes, that is true.

Q. Sometimes they are figured one way by the railroad

and sometimes they are figured differently later by the Government?

A. Yes, that is possible.

Q. Now one way of alleviating a lot of that difficulty would be for the Government to publish the rates, would it not? Is that not so?

A. No, I would not think so. They change from time to time. I do not see what advantage it would be to anybody to publish land grant rates.

Q. It would be just like publishing any other freight rates, would it not, Mr. Taylor?

A. No, because they are only available to the Government.

Q. After all we have gone over now are you coming back to your original statement that they are only available to the Government?

A. Government land grant rates?

By Examiner Norwood:

Q. Do you state that these land grant rates are not available to the competitors?

A. They can figure Government land grant rates.

Q. They can?

1250 A. But I mean the advantage of these Government land grant rates in shipping materials is available only to the Government.

Mr. Zimmerman: May I ask, does not the witness simply mean that they are of an advantage to the Government, that no other shipper may have the advantage of them? He does not mean that they are known only to the Government.

Examiner Norwood: Yes. When these cement men bid do not they know what the land grant rate is going to be?

The Witness: They can figure it as well as we can.

Mr. Leisure: I will adopt Your Honor's question. It clears up that entire line of questioning and I can save a lot of time.

By Mr. Leisure:

Q. Now, Mr. Taylor, you also testified about these Texas bids.

A. Yes.

Q. You used the figure 1916. Have you got your papers there that you had before, because I want to clear

up something which I think is a mistake. If it is not a mistake I want to find out.

A. Is it in that amount (indicating)?

1251 Q. $1916 saving to the Government, I think you said.

A. I think there is a dollar or two wrong in that computation there.

Q. That is what I was coming to.

A. I looked that over afterwards and I saw that the papers had gone through with, I thought, a mistake in that saving.

Q. The correct figure is not $1916, it is $1936, is not that right?

A. I think that is about correct. I know there is a difference there.

Q. Now you do not mean that that allowance was made just for the handling of the bills of lading, do you?

A. Well, they might have taken into account delays in shipment and penalties, possibly.

Q. It was really a difference in price or cost, was it not, Mr. Taylor?

A. Well, of course we got two bids, one commercial bill of lading and the other a Government bill of lading, and of course we did not know the reason for those differences, how the cement companies figured the difference.

Q. It is perfectly apparent that that amount would not be available just for handling the bills of lading, is it?

A. Not for clerical work, no. There were probably a few other items taken into consideration in that.

1252 Q. How did you figure the 1936, Mr. Taylor?

A. How did I figure it?

Q. Yes, how did you arrive at it?

A. I am quite sure I had the correct amount originally, and there was a typing error through in all the correspondence of 1916, but I know there was a small difference there that I found. I don't recall that it was 1936, but it was about that.

Q. This seems rather important, and I will have to find out just how you figure it. What items you took into account in arriving at 1916 or 1936. We need it on the record.

A. Well, there were four items as I recall. I took each item and just carried out—

Mr. Leisure: (Interposing:) May I have exhibit 115-G, please?

By Mr. Leisure:

Q. Could you state for the purposes of the record so we will have the record clear, how you arrived at the figure?

A. There are two schedules and two items under each schedule.

Q. Here is some figuring that we have already done. I don't know whether it is of any assistance to you or not. If not, you do not have to use it.

A. I have my figures here.

1253 Q. All right. Tell us how you figured it. Dictate it on the record.

A. There are two schedules and two items under each schedule. Schedule 1, item 1, 20,000 barrels at 2.353 equals $47,060.

Item 2, 5,000 at 2.803 equals $14,015.

Schedule 2, item 3, 290,000 barrels at 2.803 equals $812,870.

Schedule 2, item 5, 50,000 barrels at 2.353 equals $117,650.

Making a total of $991,595.

Q. What does that mean, that total? That is the delivered price?

A. Yes.

Q. Now, go right ahead.

A. The alternate bids based on the Bureau furnishing government bill-of-lading, 20,000 barrels at 2.3422 equals $46,844.

5,000 barrels at 2.799 equals $13,995.

290,000 barrels at 2.799 equals $811,710.

50,000 barrels at 2.3422 equals $117,110.

Or a total of $989,659 which is the sum of the alternate bids. That being, of course, subject to 10 cents a barrel discount.

The difference between $991,595 and $989,659, is

1254 $1,936.

Q. You have now been reading from Commission's Exhibit 116, is that correct?

A. Yes.

Q. These bids were all let under statute 3709, is that correct?

A. I believe that is the prevailing statute. I am not familiar with the numbers.

Q. And when you spoke of these bids,—cement companies being the worst offenders, did you have reference to the fact that you felt they were not competitive because they were identical?

A. They are not competitive to the government. They may be competitive to the cement mills at the mills.

Q. But they are not competitive to the government?

A. Not competitive bids as we consider competition. That is simply my opinion.

Q. You do not know of any court decision to that effect?

A. No, I would not be familiar with any court decisions.

Q. That is the understanding, not merely your understanding, but that is the understanding in your department?

A. Well, I do not want to speak for the department.

Q. I am not asking you to. That is your personal feeling, that when they are identical they are not competitive as far as the government is concerned?

1255 A. Yes.

Q. The statute does not provide that they should be competitive, does it?

A. Well, you are asking me a legal question which I would not answer.

Q. The government is interested in getting the lowest price to the government or the lowest cost?

A. It certainly is, because in our Bureau we have repayment contracts with those who benefit from the projects, and we have to buy at the lowest net delivered cost.

Q. Because you have to buy at the lowest net delivered cost, does that cause you to feel that identical bids are not competitive? Might not all of them be the lowest possible delivered price or delivered costs?

A. That is entirely possible. It might be, yes.

Q. Is it your idea that the purpose of advertising for bids is to get competitive bids?

A. Yes.

Q. Does your reading of history suggest to you that it might be possible that Congress had in mind limiting the power of government bureaus and preventing them from giving all of the business to certain individual favorites? That that might be one of the purposes for such a statement?

A. It might be.

Q. That it might be for the purpose of giving all
1256 of the public the free and fair chance of trying to get the business?

Examiner Norwood: Off the record.

(Discussion off the record.)

By Mr. Leisure:

Q. Well, regardless of whether you call it competitive bids that the statute requires you to get, which causes you to let bids, or whether you call it anything else, what the government is interested in is getting the lowest cost and the lowest price to the government when it buys goods, isn't that so?

A. Yes.

Q. The government likes to get a special rate when it can, doesn't it?

A. Well, we are obliged to take advantage of any special rates.

Q. And when you can, you take business on a cost plus basis if you can get it that way?

A. The Bureau does very little of that.

Q. But you know of such instances, do you not?

A. Yes. That is not in the furnishing of materials; it is more in construction.

Q. And while the government is interested in getting the lowest cost price, can you point out to me any instance that these offenders as you have described them who
1257 file identical prices, where they have given the government any higher price than they have to the individuals? In other words, they have never quoted the government any higher price than the commercial price, to your knowledge, have they?

A. I don't know what prices they have quoted other than the government.

Mr. Leisure: That is all.

Cross-Examination by Mr. Zimmerman.

Q. Before the code, you say you did get f. o. b. mill bids. That has continued, as to some of the companies right up to date, hasn't it?

A. I could not say that any one company has followed that practice through the entire period.

Q. But some of them you still get f. o. b. mill bids, and you have every year practically for the last ten years, haven't you?

A. F. O. B. mill?

Q. Yes; some.

A. Yes.

Q. In fact, you have had bids where no control clause has been used by some of the companies, where others at the same letting have used control clauses, have you not?

A. Yes.

Q. In other words, there has not been any abso-
1258 lute uniformity about the bids as to all terms and conditions, has there?

A. Well, in a way, yes, there has been uniformity. That is, before the code we asked for bids f. o. b. mill only, and we received bids f. o. b. mill only except in a very few cases. During the code we asked for bids f. o. b. mill and we received in practically every case destination bids, but there were some.

Q. Well, if you asked for f. o. b. mill and received destination, were those not cases where you had what were called alternative bids, where you asked for a bidding either way?

A. No. It was our aim during the code to get prices f. o. b. mill, as it was before the code, and as it has been after the code. If we get mill bids, we can figure a destination cost with very little trouble by simply adding the best available freight rates, but as I say, during the code we did get f. o. b. mill bids in some cases, and since the code we have received bids both ways.

Q. But you did ask for bids both ways?

A. After the code.

Q. Why did you ask for them both ways after the code, if you know?

A. Well, I don't know as I can give you the exact rea-
son for that. There are so many angles to the cement situation, and these specifications are prepared in
1259 our Denver office and not here.

Q. Then you would not know why the Denver office, where the specifications are prepared, gave an option to the bidder to bid either f. o. b. mill or f. o. b. shipping point, which is more accurate—that is the language which you used—or f. o. b. destination?

A. When we asked for bids f. o. b. shipping point or

mill, we reserved the right under paragraph 8 to ship under government bill-of-lading, and so forth.

Q. I understand that, but I do not believe you have answered my question. Perhaps you might read it to him, Mr. Reporter.

(The question is read.)

Examiner Norwood: Answer whether you know that or not.

The Witness: I would not know their reasons.

By Mr. Zimmerman:

Q. Well, if the specifications gave no option to the bidder but merely asked for a destination point and reserved the right to substitute a government bill-of-lading, then there would not be any question of control clause involved, would there?

A. Do I understand that you ask that if the government invites destination bids, and reserves the right to ship on government bill-of-lading, whether there 1260 would be any necessity for a control clause or not?

Q. No, not necessity. I say, there would be no question of control clause involved.

Examiner Norwood: If they used a government bill-of-lading, they would apply those rules for the reduction, is that the idea?

Mr. Zimmerman: It is clear that there would be no control clause involved, as I understand it, but I may be wrong. I am asking Mr. Taylor as an expert on it.

Examiner Norwood: Is that true?

The Witness: I don't understand the question. The control clause is not the government clause; it is a cement company clause.

By Mr. Zimmerman:

Q. Well, the government has used it in its specifications, hasn't it?

Examiner Norwood: It is a clause covering the reduction of freights, isn't it?

Mr. Zimmerman: The control clause does provide for a method, as I understand it, as has been explained here, for a method of arriving at the price at the shipping point by deducting freight from destination cost or destination price. That is correct, isn't it?

The Witness: The control clause that has been
1261 referred to in these hearings is the control clause submitted by the cement companies in their bid.

By Mr. Zimmerman:

Q. Where the invitation for bid contains a paragraph which gives the government the privilege of shipping on a government bill-of-lading and deducting from the destination bid, the commercial, and adding the land grant or special rate, that is a form of control clause designed by the government, isn't it?

A. You might call it such. It is a part of the specification, but it is not the control clause that we refer to here.

Q. What you have referred to as the control clause is something like this, "f. o. b. cars destination, to be shipped on government bill-of-lading, deduction to be made from the bid price for invoicing purposes of an amount equivalent to the freight required to be paid by the government." That is a form of control clause?

A. Not quite.

Mr. Wooden: Read the rest of it.

The Witness: By deducting either the land grant, special or commercial, whichever is the lowest. That is the way the cement companies state it in their bids.

By Mr. Zimmerman:

Q. What would be the difference? That is the freight that is required to be paid by the government, isn't
1262 it? The point is that they may deduct the freight they have to pay and no more. That is correct, isn't it?

A. What you are reading there?

Q. No, I am talking about the effect of the control clause. The effect of it is to permit the deduction of whatever freight rate the government has to pay?

Mr. Wooden: It is required rather than permitted.

Mr. Zimmerman: Well, I think that is a distinction that does not make any difference to me.

Examiner Norwood: That applies only when a government bill-of-lading is used, is that right?

Mr. Zimmerman: That is correct. Or substituted. There may be a circumstance where a government bill-of-lading may be substituted for a commercial bill-of-lading. Now, may I have the question read?

(The question is read.)

By Mr. Zimmerman:

Q. Do you understand the question? If you do not, we will strike it and start again.

A. I really do not.

Q. Well, let me strike it out and ask this. What is the effect as to the control clause as to what may be deducted from the destination price in order to determine the price at the shipping point?

1263 A. What I understand the effect of the control clause is where we get a destination bid, to determine the price f. o. b. mill we must deduct either the government land grant rate, commercial rate or special rate, whichever is lowest.

Q. Well, now, the effect of it is and what I am trying to develop is that the government deducts the freight which it is actually required to pay, is that correct?

A. Yes, I think it is.

Q. In other words, if there is a special rate, that is the rate which the government is required to pay, isn't it?

A. If it is the lowest rate, it is the rate we would pay.

Q. Yes, exactly. And that is the thing which, as I understand it, and I think I do, that the control clause permits to be deducted? That is the freight which the government is required to pay, the lowest freight rate?

A. To determine the f. o. b. mill price, yes.

Q. All right. Now, let me read this to you again. Suppose we say "f. o. b. cars, shipping point for example we will take Cairo, Illinois, to be shipped on government bill-of-lading, deduction to be made from the bid price for invoicing purposes of an amount equivalent to the freight required to be paid by the government." Now, isn't that the control clause in substance and effect?

A. I should say so, yes. About that.

1264 Q. Now, then, if you should find that in a government specification you would say then that the government had put in that specification a clause which was in substance and effect a control clause, would you not?

A. Yes, if I found the control clause in the government specification—

Q. (Interposing.) If you found the clause which I have read to you, in a government specification, is what I am talking to you about.

A. No, I would not say that it had the same effect as

the control clause, because of it being in government specifications which had reference to other parts of the specifications.

Q. Well, explain now just why it would not be in substance and effect a control clause?

Examiner Norwood: Isn't that based on what the government should pay? The lowest rate the government should pay, rather than what it actually did pay?

Mr. Zimmerman: No, what it is required to pay.

Mr. Wooden: I said that the control clause would require the government to deduct the land grant rate or the special rate, because it is always lower than the commercial rate.

Mr. Zimmerman: But it is what the government is required to pay.

Mr. Wooden: Required to deduct. The govern-
1265 ment itself does not know in advance what it is required to pay to the railroad. It has to figure it out.

Mr. Zimmerman: That begs the question. I say, whatever is deducted is whatever the government is required to pay, and no more. That is the general effect, isn't it?

Mr. Wooden: The government does not know itself in advance what it is required to pay, and therefore it cannot deduct exactly what it is required to pay. It can only deduct an estimated amount, and that is what the bidders do. They estimate the land grant rate.

Mr. Zimmerman: No, the effect of the land grant rate, as the witness has explained it, is that the government then may deduct only the amount which it eventually has to pay and no more.

Mr. Wooden: Which it has to pay the railroads?

Mr. Zimmerman: For the freight. Yes, and no more.

Mr. Wooden: Whichever rate is lower?

Mr. Zimmerman: That is all they do pay. In other words, it does confine them.

Mr. Wooden: They deduct the exact amount.

Mr. Zimmerman: But they do that before they pay the invoice, and that is all under the control clause, that they can deduct.

1266 Mr. Wooden: They don't know until they get the invoice from the railroad.

Mr. Zimmerman: That is what I am talking about: the invoice from the railroad. Let us not have any misunderstanding. When they pay the railroads the freight,

then they know what they may deduct and not before; is that right?

Mr. Wooden: It may be a long time afterwards.

Examiner Norwood: Suppose the government through a mistake should pay more than the lowest land grant rate or whatever rate they should pay; then they would not be authorized to deduct that, would they?

Mr. Zimmerman: I cannot imagine such a case, can you, where the government would be required to pay anything more than the actual rate proved to be?

Examiner Norwood: That might come up in the construction of the terms of this contract.

Mr. Zimmerman: I do not think so. May I ask the reporter to read the question?

(The question is read as follows: "Well, explain now just why it would not be in substance and effect a control clause?")

The Witness: It is a control clause, but not the control clause.

By Mr. Zimmerman:

Q. How does it differ in any way in its effect?

1267 A. I will have to ask you to read that once more.

Q. I will. I will read it again. The words that I read to you were these. I use for example a destination like Cairo, Illinois, and it will read this way: "f. o. b. Cairo, Illinois, to be shipped on a government bill-of-lading, deduction to be made from the bid price for invoicing purposes of an amount equivalent to the freight required to be paid by the government."

Examiner Norwood: That is on a particular contract there?

Mr. Zimmerman: This, as I explained, is made from a memorandum which I have prepared.

Examiner Norwood: But it is not the usual control clause?

Mr. Wooden: No, that is one of his own devising.

Mr. Zimmerman: You see, these control clauses are not always word for word the same.

Examiner Norwood: Your question, you have asked him if that is not really a control clause?

Mr. Zimmerman: If it is not, in substance and effect.

Examiner Norwood: I think he said it was a control clause, but not the control clause.

Mr. Zimmerman: All right. Now, I am asking him in what particular if any in its effect that differs from
1268 what he refers to as the cement control clause?

The Witness: Well, the cement control clause so-called, the cement company control clause requires a deduction of the lowest of three stated rates, commercial, land grant, or special. But this control clause you read only mentions land grant.

By Mr. Zimmerman:

Q. No, it does not make any reference to land grant at all.

A. So I understood.

Q. It does not refer to land grant; it only refers to the freight which the government has to pay. The language is, "freight required to be paid by the government." That might be land grant, it might be special, it might be commercial; whatever it is that it is required to pay is to be deducted.

Mr. Zimmerman: I will ask the reporter to read the question.

(The question is read.)

The Witness: There is no question there. That is just a statement.

Mr. Zimmerman: As I understand it, the witness
1269 did say the clause was in substance and effect the same as the control clause.

Examiner Norwood: No. He said that was a control clause.

Mr. Zimmerman: He said if that were put into a government specification, it might not be the same, because you would have to consider it with other clauses in the specifications. Now, perhaps I am wrong about that. Will you go ahead Mr. Witness and explain what you want there?

The Witness: I said it was a control clause.

By Mr. Zimmerman:

Q. All right. Now, I am asking you to point out—

A. (Interposing.) I don't know what effect it would have if it was in a government specification.

Q. Well, would the effect differ in any way that you can point out from the control clause that you have characterized as the cement control clause?

A. We have to put the two side by side and see just how they would affect it.

1270 A. Well, we would have to put the two side by side.

Q. All right. Would you state what you call the cement control ~~clause~~ now? Take your time in stating it.

A. It has already been put into the record.

Q. Well, you know it by heart, do you not?

A. No.

Examiner Norwood: You may refresh your memory.

By Mr. Zimmerman:

Q. Refresh your memory in any way you like.

A. It, in substance, reads: The Government shall determine its price f. o. b. for invoicing purposes by deducting either the commercial freight rate, the Government land grant rate, or special rate, whichever is the lowest. That is the substance of what we call the cement companies' control clause.

Q. All right. Now we have agreed upon that. I will ask you this, that under that clause the effect is that the Government may deduct only the freight which the Government is required to pay?

A. Required? Which it estimates it may have to pay.

Q. Oh, no, it deducts either the special rate, or the land grant rate, or the commercial rate, whichever one of the three is applicable, does it not?

A. Yes, whichever is the lowest.

Q. All right. That is what the Government has to pay too, is it not?

1271 A. They have to pay the rate, but not—no, they do not have to pay the rate. They do, of course, pay, or use whichever rate is the lowest when the shipment is made, yes.

Q. That is right. So they do pay it?

A. Yes.

Q. Whichever rate is the lowest is what they do pay?

A. Yes.

Q. That is just the same as if I say "is required to pay." They pay only what they are required to pay, do they not?

A. Yes.

Q. All right. Now then let me read this language to you once more.

A. May I ask a question?

Q. Certainly.

A. Is this language which would appear in the cement company's bid or in the Government specifications and invitation for bids?

Q. Well, it does not make any difference where it appears. I am saying if such a clause were used in a specification.

A. A Government specification?

Q. Yes. Let us just suppose, for the purposes of our statement here, that it is inserted in a Government specification, that does not change the meaning of it in any way, does it?

A. Well, it certainly makes a great deal of difference whether it is in a bid or in an invitation for bids.

1272 Q. If it was in an invitation for bids and then repeated in the bid it would be the same thing, would it not? The meaning would be the same in any event?

A. Yes, but you want to apply it to a comparison with the so-called control clause.

Q. That is right.

A. Which is in a cement company's bid.

Q. Putting it in the cement company's bid does not change the meaning of it in any way, does it?

A. Not the meaning of the phrase, no.

By Examiner Norwood:

Q. Just assume it was in the invitation and in the bid, then what would be the difference between that and the regular control clause?

Mr. Zimmerman: That states it.

Examiner Norwood: If you know.

A. It is in the invitation for bids, as I understand it, and asks for bids f. o. b. mill.

Mr. Zimmerman: Now just read the Examiner's question, will you, Mr. Reporter?

(The question was read.)

Examiner Norwood: That is the specification he read there and the regular control clause.

The Witness: I do not think you can make a comparison between a statement that is in a bid and in an

1273 invitation for bids. They are altogether different.

Examiner Norwood: Assume they are in both.

The Witness: As I understand the clause that he read, it calls for f. o. b. bids, f. o. b. mill bids.

Examiner Norwood: Yes.

The Witness: Shipment to be made on Government bill of lading.

Examiner Norwood: Yes.

Mr. Zimmerman: Perhaps we better read it to him again. It is a destination bid with the right to make certain deductions; shipment to be made on a Government bill of lading, deduction to be made from the bid price for invoicing purposes.

The Witness: The destination bid, shipment to be made on Government bill of lading?

By Mr. Zimmerman:

Q. That is right.

A. And deductions for invoicing purposes to be made how?

Q. Of an amount equivalent to the freight required to be paid by the Government.

A. That is in substance the same as the control clause.

Q. Exactly. Now where the specifications provide for two forms or methods of bidding, one f. o. b. mill bid and the other f. o. b. destination, making it optional to the bidder to bid either way, if the bidder does bid either
1274 way the bidder has complied with all the requirements to make a legal bid, has it not?

A. Yes. If he bids either way and his bid complies with the specifications, yes.

Q. For example, using any one of these invitations for bids or schedules,—I am referring now to Commission's Exhibit 113, referring to page 11, paragraph 8, under the title "Deliveries," which you may look at to refresh your recollection of it—(handing document to the witness).

A. This is either way, f. o. b. cars at shipping point or f. o. b. cars at destination.

Q. In other words, it says here that it is at the option of the bidder?

A. Yes.

Q. To bid either on the basis of delivery f. o. b. cars at the shipping point or f. o. b. cars at destination?

A. Yes.

Q. So that if bids are submitted in either one of those ways the bid is a legal one?

Mr. Wooden: Let that be confined to the particular project and the particular exhibit and not to the general practice.

Examiner Norwood: Yes.

Mr. Zimmerman: No, I am asking that as a general question, wherever that occurs.

1275 Examiner Norwood: Yes.

Mr. Zimmerman: In the specifications.

Mr. Wooden: That is not true.

By Mr. Zimmerman:

Q. If bid either way then it is a legal bid, is it not?

Examiner Norwood: He specified the contract which permits that and none other.

Mr. Zimmerman: Yes, I say wherever that occurs in the specifications.

Mr. Wooden: It does not always occur.

Mr. Zimmerman: I do not know how many times it occurs.

A. Where that occurs the bid is a proper bid, if it is made f. o. b. shipping point or f. o. b. destination.

By Mr. Zimmerman:

Q. We had another one here a moment ago. Here is Commission's Exhibit 122. The pages are not numbered but the clause is paragraph 8 entitled "Deliveries." (Handing document to the witness.)

A. We asked for bids f. o. b. cars at shipping point or f. o. b. cars at destination, at the option of the bidder, with the proviso following.

Q. But if bids were submitted either way they would be perfectly legal, would they not?

A. Provided the other requirements of that paragraph are met.

1276 Q. That is to say that if they were a destination bid there would be certain other requirements applicable?

A. Yes. We must have the right to deduct commercial, and so forth.

Q. Now the methods of bidding as prescribed in the invitations to bid are methods worked out by the Government, are they not?

A. Yes.

Q. And the language is never anything else except that chosen by the Government?

A. No.

Q. And if a clause such as the one that I supposed to

you as an example were included in the Government specifications it would be put there because the Government chose to put it there for reasons of its own?

A. We could assume that if it is in the Government specifications the Government would put it there.

Q. Now sometimes these Government specifications have set forth in words and figures, and symbols, the land grant rates which the Government published to the bidders as applicable to the bids, have they not?

A. I do not recall any cases where we have ever put Government land grant rates in our invitation for bids, and specifications.

Q. Well now then, you have not examined all the
1277 specifications submitted by the Government on all the dam projects, have you?

A. I am not familiar with other Government bureaus.

Q. Well, are all the dam projects that have been offered for bidding by the Engineers Office, within your knowledge?

A. There are other Government bureaus that build dams.

Q. And other engineering offices of the Government?

A. Yes. The Office of the Chief Engineer, Tennessee Valley Authority, and other bureaus of the Interior Department.

Q. Well, to choose, for example, one that has been set forth in the complaint at Fort Peck, the job there, that would not be within your jurisdiction?

A. No, that is a job under the jurisdiction of the Office of Chief of Engineers.

Mr. Zimmerman: I suppose these several instances set forth in the complaint are not within the jurisdiction of Mr. Taylor's department, are they?

Mr. Wooden: I do not know whether I can anwser that off hand or not.

Mr. Zimmerman: I thought maybe your associate there who is a sort of statistician could tell us that.

Mr. Wooden: We have made no effort to confine our proof, of course, to the cases cited in the complaint.

Mr. Zimmerman: I do not mean that. I mean I
1278 do not want to examine this witness, or to attempt to examine him on something that he does not know anything about.

Mr. Wooden: On the other hand we have not as yet

made a specific effort to establish all the cases in the complaint.

Mr. Zimmerman: I know that. As I say, I do not want to take time to examine Mr. Taylor on things that I would not suppose he ought to know about. So if you can tell us that—

Mr. Wooden: Just what was the question?

Mr. Zimmerman: As to whether these several examples, I do not know how many, 14 or 15 of them, supposed identical price bids on Government projects—

Mr. Wooden (interrupting): No, they are not all identical.

Examiner Norwood: You are cross-examining him on his testimony, not on the complaint.

Mr. Zimmerman: All right.

Mr. Wooden: The cases that are in evidence through the Bureau of Reclamation, he could speak on those.

Examiner Norwood: He would not be expected to know anything excepting about his division of the Department.

Mr. Wooden: There are other branches in the 1279 Government, of course.

Mr. Zimmerman: There is nothing more. Thank you.

Examiner Norwood: Any redirect examination?

Redirect Examination by Mr. Wooden.

Q. Mr. Taylor, when you said that in substance the control clause of the cement companies and the paraphrasing of it which Mr. Zimmerman made and asked you to say whether that was in substance the same, did you take into consideration in your answer the difference between the actual land grant rate paid when the railroads were finally paid and the estimated rates which you used an analyzing the bids?

A. I believe I stated that we used estimated rates, which were of course not the rates actually paid.

Q. So then it does not follow, as I see it,—and I would ask you to check me on it,—that this paraphrase of the control clause calls for the deductions of the actual amount which the Government pays the railroad?

A. No.

Q. To what extent do you consider the control clause used by the cement companies in conflict with the Govern-

ment's specifications that they would deduct the commercial rate from any destination price?

A. We consider the control clause as being in conflict with the requirements of our specifications.

1280 Q. In other words, if your specifications stand the control clause can not stand, and vice versa, if the control clause stands your specifications can not stand on that point, is that right?

A. That is correct, yes.

Q. Would you say then that the control clause, if accepted and acted upon, operated to defeat the Government's specifications that were given in advance, that they would deduct the commercial rate if a destination price were quoted?

A. Yes.

Q. What difference does it make whether you deduct a lower rate, estimated or otherwise, instead of a higher rate in the price you pay for cement?

Mr. Zimmerman: I am going to object to the question for this reason, that I think Mr. Wooden has put something into the situation which does not exist. The control clause does not refer to estimated freight rates, it refers to actual freight rates, does it not?

Mr. Wooden: But the practical situation is that they have only the estimated rate to go by at the time they are figuring on it.

Mr. Zimmerman: But they are supposed to deduct nothing except the actual rates, not the estimated rates.

Mr. Wooden: And they do not know that for six months.

1281 Mr. Zimmerman: The question as to who is the lowest bidder does not depend upon the estimated freight rates but the actual freight rates.

Examiner Norwood: I think it has been shown that they make these awards on the estimated rates. Now when it comes to the final payment, that is something else.

Mr. Zimmerman: I was under the impression tha they made the award upon the actual rates. That would seem to me to be the only fair way that they could do it.

Mr. Wooden: It is impractical to do it that way.

Examiner Norwood: Read the question.

(The question was read.)

By Mr. Wooden:

Q. From the destination price for cement.

A. A deduction from the destination bid, of course, is made to determine the f.o.b. mill price so we can ship on Government bill of lading, and—

Q. (Interrupting) If you take—pardon me. I do not want to interrupt.

A. Your question, I do not quite get it.

Q. I will follow it up. If you deduct a lower rate, estimated or otherwise, from the destination price, does that increase the realization of the mill at point of shipment for its cements?

1282 A. Yes.

Q. And if you deduct the higher rate, such as the commercial rates, does that reduce the realization of the mill for cement at the mill?

A. Yes, it does.

Q. Would you have any difficulty over this whole proposition of land grant rates if the mills would simply quote f.o.b. mill without any strings attached to the qualification?

A. We would have no trouble at all.

Q. As I understand it, you try to get such bids f.o.b. mill; sometimes you have failed and sometimes you have succeeded?

A. That is correct. I might qualify that by saying that we have since the code, as a general rule, asked for bids both ways, f.o.b. mill and/or destination, having in mind that the bidder may wish to submit a destination bid and a mill bid, as they sometimes do, and submit the two, and we of course figure the lowest delivered cost, either way, of shipment.

Q. Do I understand then that your general practice has been to request not an optional bid f.o.b. mill or destination but on both bases, f.o.b. mill and/or destination?

A. As I recall the invitations recently have been that way, f.o.b. shipping point and/or destination.

1283 Examiner Norwood: It gives the Government the right to select the f.o.b. mill or the other one?

The Witness: Yes.

By Mr. Wooden:

Q. Mr. Zimmerman suggested that one way to solve this difficulty would be for the Government to publish land grant rates.

Mr. Zimmerman (interrupting): No, excuse me. I did not make that statement. You are thinking of something that Mr. Leisure said.

1284 Washington, D. C.,
Friday, December 17, 1937.

1287 P. I. TAYLOR thereupon resumed the stand as a witness for the Commission and testified further as follows:

Redirect Examination by Mr. Wooden (Continued).

Q. Mr. Taylor, last night I was directing your attention to a suggestion made by Mr. Leisure on cross-examination that one way to solve this difficulty over land grant rates and whether the control clause operated to deprive the Government of the benefit of land grant rates was
1288 to publish the land grant rates. Would you say that another way to solve the problem would be for the mills to quote f.o.b. mill?

A. Yes, that would solve our problem.

Q. Would the mills then have to bother about how land grant rates were figured, how they need to be figured, how they need to figure them or anybody else needs to figure them?

A. No.

Q. Suppose you did want to publish land grant rates, do you have the information on which you could publish the actual land grant rates in advance of the settlement with the railroad?

A. We could not publish the rates as used in the settlement, we would have to estimate the rates to the best of our ability.

Q. Do you know whether shippers themselves have to estimate the land grant rates when they figure them or not?

Mr. Leisure: I think the shippers are the ones who could give the best evidence on that, if the Court please. They can testify best to what they have to do.

Examiner Norwood: There is no best evidence rule that applies to that.

Mr. Wooden: I agree that that is true, but at the same time I do not think that is an incompetent question with this witness. I think the shippers do know more about it, but that does not prevent this witness from
1289 answering such a question.

A. In my opinion anyone has to estimate the

Government land grant rates. Anyone can figure them, but they may not figure them alike.

By Mr. Wooden:

Q. Now yesterday afternoon, according to the transcript, the presiding Examiner asked you this question:

"When these cement men bid do not they know what the land grant rate is going to be?

You answered:

"They can figure it as well as we can."

A. That is correct.

Q. But what is your answer specifically to the question as to whether the shippers know what the land grant rate is going to be?

Mr. Leisure: I do not believe this witness is competent to testify as to what the shippers know. I object to that question as being incompetent.

Examiner Norwood: Yes, he can give any facts that would indicate what the shippers know, or what they have told him, or what he has learned from their printed literature, or anything like that.

Mr. Leisure: I object to his giving anything they told him, or any suggestions, or any conclusions of his mind.

It is hearsay. The Government has plenty subpoenas.
1290 It can produce that evidence on proper information, not on the conclusions of this witness' mind, or on hearsay evidence, or what he has been told.

Examiner Norwood: That is one thing he can give hearsay evidence on, to prove their knowledge and state of mind. Giving their statements is not strictly hearsay evidence.

Mr. Leisure: Not if he is offering it for the truth of the statements. Unless it is the truth of the statement that counsel wants, unless it is material in this case, I do not think it is competent.

Examiner Norwood: The best evidence of what they know, not as to the truth of the statement; a verbal attitude.

Mr. Wooden: I have not asked him any such question anyway.

Mr. Leisure: I object to the question as incompetent for the reasons stated.

Examiner Norwood: Overruled. I will permit him to state facts and not conclusions as to what they know.

Mr. Wooden: Do you want the question read?
The Witness: Yes.
Mr. Wooden: Read the question, Mr. Reporter.
(The question was read.)

By Mr. Wooden:

1291 Q. I mean the actual land grant rates.

A. All they know is the estimated rate. They do not know the actual rate that is used in the settlement.

Examiner Norwood: I think I will strike the answer out of my own motion. You can give any facts which indicate to you and to us what they do know about it, what information is in their possession with regard to it.

The Witness: With regard to the land grant rates?

Examiner Norwood: Yes. Do they have the complete data, the same that you have?

Mr. Wooden: Your Honor, the point is that the railroad itself does not know what it is going to be, the Government itself does not know what it is going to be until the settlement. If the shippers know what it is going to be they know more than either of the parties directly concerned.

Examiner Norwood: They may have data and figures that are different from the data and figures which the Government has.

The Witness: The data available is published, percentages applying to freight rates existing on certain railroads, and anyone can figure from those percentages the Government land grant rates.

Examiner Norwood: Do the shippers have that data?

1292 The Witness: Anybody can get that information.

Examiner Norwood: Do they have the same information that you have?

The Witness: It is available, as I understand it, to everybody.

By Mr. Wooden:

Q. But, as you said yesterday, no two people would figure it the same way?

A. Yes, that is correct, because of carrying out to a certain number of decimal places you can see that two people might not figure it exactly alike, and in applying that rate to a certain poundage you might get a little different results.

Q. And does not the factor of division points and division of business between land grant and non-land grant roads enter into the picture?

A. Yes.

Q. Are the land grant rates that you used for estimating the lowest bid, are they different from different mills or are they the same from all mills?

A. They are different from different mills.

Q. So if you were to attempt to publish land grant rates you would have to publish them from all the mills rather than just from one mill, would you not?

A. I believe the only way it could be published
1293 would be the way it is published at the present time, in the manner of percentages applying to existing commercial rates.

Examiner Norwood: For shipments over designated lines?

The Witness: Yes.

By Mr. Wooden:

Q. On the Bureau purchases does the Government take title to the cement at the mill?

A. It depends on the bid. If we get a rush destination bid and then with it the mill price, why, we sometimes allow the cement companies to ship commercial bill of lading. It all depends on the circumstances.

Q. But in order to get the benefit of land grant rates you have to take title to the property at the mill, do you not?

A. That is on a destination bid, to obtain the advantage of Government land grant rates we have to figure the mill price and then ship on Government bill of lading and use, or rather pay Government land grant rates.

Q. Well, if you take title to the cement at the mill and ship on Government bill of lading and pay the cement company their price at the mill, do you see any legitimate concern for anyone to care about the land grant rate other than the Government and the railroad?

A. I do not think it is any concern of the cement companies what the Government pays, or how they ship their material.

1294 Q. What it pays for transportation?

A. Yes.

Q. Now some reference was made in cross-examination to the Government always being right and always having

the last say as to this control clause, and that it had a control clause of its own providing for the deduction of the commercial freight. Is that any different or any more than any buyer has to determine the conditions on which he will buy and pay out his money?

A. No. I think what has been referred to as a control clause in our specifications is simply one of several provisos that are part of specifications which cover the purchase of that particular material, and—

Q. (Interrupting): As I understand it—go ahead.

A. That is all.

Q. As I understand it, there was a period during which you ignored the control clause on the strength of the Comptroller General's ruling that the use of that clause operated to deprive the Government of the benefit of land grant rates?

A. As I understand your question—possibly you better repeat it.

Examiner Norwood: Read it, Mr. Reporter.

(The question was read.)

Examiner Norwood: Can you answer that?

The Witness: Yes. We did not follow the
1295 Comptroller General's decision, although I do not recall—

By Mr. Wooden:

Q. (Interrupting): Which Comptroller General's decision, or which decision of the Comptroller General, I should say? You mean the one in which he held that this control clause did operate to deprive the Government of the benefit of land grant rates?

A. I may have those decisions—

1296 Q. Referring to Exhibit 113, Commission's Exhibit 113 on page 11, your Grand Coulee specifications, did you there reserve the right to deduct the commercial freight from the so-called Government destination cost?

A. Yes.

Q. Referring now to Exhibit 124-B, paragraph 8, the specifications for the Parker Dam in October, 1937, did you there reserve the right to deduct the commercial rate from the Government destinaton costs?

A. Yes.

Q. I call your attention to the fact that this latter specification provides that you may do so "unless other

rates are specified by the bidder." That was not in the previous invitation, was it, or specification?

A. No, it was not.

Q. Under that would you or would you not say that constitutes a recognition and acceptance of the control clause?

1297 Mr. Leisure: May I have the question read?

(The question was read.)

A. It looks to me like a recognition of the control clause.

Mr. Wooden: All right.

Mr. Zimmerman: Is that a complete answer? Does that include "acceptance"?

Mr. Wooden: Well, he did not use the word "acceptance".

Mr. Zimmerman: If it is "recognition" I will accept it.

By Mr. Wooden:

Q. My question was not only as to recognition but also as to acceptance.

A. Yes.

Q. Now as to your getting bids f. o. b. mill, did you ever get a bid f. o. b. mill on cement that was not tied to a particular project, and for shipment to a particular destination?

A. Yes.

Q. How about the cases that are here in the record? Are there any such cases there where the destination was not known to the bidder at the time he bid?

A. I do not recall without reference when one of those cases has been put into the record.

Q. Would you say it was exceptional if it states
1298 where you got a bid that was not tied to some particular destination?

A. Very exceptional, yes.

1299 Q. Showing you papers marked Commission's Exhibit 127-A and B for identification, do those papers represent the one instance that you refer to? (Handing paper to witness.)

A. (Examining papers): This is one of the instances I had in mind, yes.

Mr. Wooden: I offer it for the record.

Mr. Zimmerman: What is that?

Mr. Wooden: Regarding getting the f. o. b. mill quotation without any question where it was to go to.

Mr. Leisure: May I ask the witness a question on the voir dire about this paper?

Examiner Norwood: Yes.

Mr. Leisure: What is this paper; where did it come from?

The Witness: It is a copy of a memorandum in our files.

Mr. Leisure: It came from your files?

The Witness: Yes.

Mr. Leisure: And that is merely one of the instances that you have described?

1300 The Witness: It is one that I had in mind, yes.

Mr. Leisure: No objection.

(COM. EX. 127-A and B was offered and received in evidence.)

By Mr. Wooden:

Q. Did you say you prepared the memorandum?

A. Yes.

Q. Referring to Commission's Exhibit 112-D involving the Grand Coulee bids—in August, 1935, is that correct?

A. Yes.

Q. Is that a case where you got bids f. o. b. mill?

A. Yes.

Q. In that case, did the getting of bids f. o. b. mill result in different destination prices or not?

A. Four of the bids were exactly alike.

Q. In what amount per barrel?

A. Four bids resulted in net delivered cost of 1.9188. The fifth bid resulted in a net delivered cost of 1.9192, a difference of .0004. There were two other bids that were different.

Q. Higher or lower?

A. Yes, there was a higher bid from the Beaver Portland Cement Company of Portland, Oregon, which resulted in a net delivered cost of 2.28899928. Those 1301 figures all refer to one item of the schedule.

Q. And there was considerable difference, was there not, between the bids on the f. o. b. mill basis?

A. Three of the mills bid 1.3796; one mill 1.53, and a fifth mill, 1.38.

Q. Now, on cross-examination you were asked concerning the theory that underlies section 3709. Have you

seen opinions of the Comptroller General stating what the theory was?

A. I have not read them except possibly casually. I am not so familiar with the decisions.

Q. On page 1255 of yesterday's record, on cross-examination you were asked this: "Does your reading of history suggest to you that it might be possible that Congress had in mind limiting the power of government bureaus and preventing them from giving all the business to certain individual favorites, that that might be one of the purposes for such a statute?" And you answered, "It might be." Do you consider that the filing of sealed bids after advertisements as required by section 3709 operates to give the business to certain individual favorites?

A. No.

Q. Just how far wrong would you say that is?

Mr. Leisure: I think that question is objectionable, if the Court please. He said No. If he 1302 wants to elaborate, he can.

Examiner Norwood: He can explain it if he wants to.

Mr. Wooden: I would be interested in knowing whether he considered it merely inconsistent or opposite to what he considers to be the truth of the matter.

The Witness: What is the question?

(The question is read.)

Mr. Leisure: I do not understand that question. I don't know whether the statement is wrong or the interpretation of the witness of the statute is wrong.

Examiner Norwood: He can give further explanation of his answer to the questions of counsel for the Commission as read to him, if he wants to.

Mr. Wooden: I want to get his judgment on the relation of section 3709 to the suggestion that it was to prevent the business being given to certain individual favorites.

The Witness: I will answer that by saying that I am not a lawyer, I am not familiar with the statutes, and I do not think that is a fair question.

By Mr. Wooden:

Q. I will ask you whether or not you think section 3709 operates to give all the bidders a free and fair chance to get the business?

1303 A. That is my understanding of it, yes.

Mr. Leisure: It was my suggestion that that was the purpose of the statute in my cross-examination. I don't know whether he is trying to prove whether I was wrong or not.

Examiner Norwood: We are not going to prove the meaning of the statute by this witness.

Mr. Wooden: I would not have gone into it if counsel had not gone into it on cross-examination, and that the purpose of the statute was to prevent individual favoritism was something I could not quite stomach.

By Mr. Wooden:

Q. Now, showing you, Mr. Taylor, an opinion of the Comptroller General, A-83392 dated February 5, 1937, with regard to this so-called control clause, I will ask you whether or not there is any connection between it and the insertion in your specifications in Exhibit 124-B of the language, unless other rates are specified by the bidder?"

A. These specifications were prepared in the Denver office, and that question can best be answered by someone in that office.

Q. Do you know in the course of your duties whether there is any connection or do you see any connection there?

A. There is some connection possibly, but I am not in a position to—I do not know the reasons for the
1304 Denver office putting that particular clause in these specifications.

1305 *Recross Examination by Mr. Leisure.*

1307 Q. Let me ask you, Mr. Taylor, in figuring your competitive price, do you figure it at destination or do you figure it at the mill?

A. For comparison of bids, we figure net delivered cost.

Q. To you?

A. Yes.

Q. And when you ask for bids, regardless of how it is quoted to you, you figure it at the destination how much it is going to cost you?

A. In comparing bids, yes. The net delivered cost is the basis.

Q. That being true, you might have a bidder who was

lower at the mill, lower than any of the other bidders, yet you would not give him the business because of the destination price might not be as low as some of the others, isn't that so?

A. Yes.

1310 By Mr. Leisure:

Q. I will ask you just one further question on that subject. Assuming that you are not in the government service and that you are a shipper to the government, and knowing, as we all know, that the government does figure at destination, would you want to figure your price at your mill or would you want to figure it at destination where you might be successful?

A. I do not see any reason why you could not figure a mill price if you want to bid and compete with other manufacturers.

Q. That is a fair question and deserves a fair answer. Didn't you tell me a moment ago that a man might be low at the mill and still lose the business?

A. Yes, I think that might be true.

Q. Then isn't that one good reason for not wanting to figure the price at the mill but wanting to figure it at the destination where he might be successful?

The Witness: That might be one reason, yes.

1311 *Cross Examination by Mr. Zimmerman.*

1312 Q. You have told us as I understand it, that bids were awarded, contracts were awarded on the estimated freight rates, is that correct?

A. In determining the lowest bidder to whom the contract is to be awarded, the government land grant rates or other rates are computed to the best of our ability, that is, we have a traffic agent who figures out, and we take his computations as correct.

1316 By Mr. Zimmerman:

Q. Mr. Witness, what you attempt to do in awarding a contract is always to figure what are the cement costs of the Government laid down on the job, is it not?

A. For a comparison of the bids received, yes.

Q. And the purpose of comparing the bids is to determine to whom the award is to be made?

A. To determine the lowest delivered cost to the Government and the award to the lowest bidder.

Q. Yes, and the lowest bidder is considered by you to be the one where you can figure the lowest cost to the Government at the job?

A. Not exactly. Not the lowest bid of the bids received.

Q. The lowest cost at the job, is what I am asking about.

A. The lowest delivered cost, yes.

Q. And that is the basis of the award?

A. Yes.

Q. For example, if we look at this Commission's Exhibit 127-A—(handing document to the witness).

A. Yes.

Q. Now that is an example, as I understand it, where you solicited and asked for a price. Without stating the differences at all, you simply asked for f. o. b. mill bids on 10,000 barrels, did you not?

1317 A. On 40,000 barrels, yes.

Q. All right, 40,000 barrels. You asked for f. o. b. mill bids?

A. Yes.

Q. And you got those bids?

A. Yes, we received four bids, I believe.

Q. Now just read into the record the four bids and the prices that were bid on them.

A. The four bids received were from the Henry Cowell Lime & Cement Company, San Francisco, California, $1.80 per barrel. Monolith Portland Midwest Company, Denver, Colorado, $2 per barrel. South Dakota State Cement Commission, Rapid City, South Dakota, $2 per barrel. Oregon Portland Cement Company, Portland, Oregon, $2.50 per barrel.

Q. Now so far as the price was concerned, who was the lowest bidder?

A. The lowest price f. o. b. mill was $1.80.

Q. Did not you read $1.50 for one of them?

A. No, $2.50.

Q. Here is $1.50, is it not (indicating)?

A. No.

Q. Is that $1.80?

A. $1.80, yes.

Q. $1.80 is the lowest one?

A. Yes.

1318 Q. Now to whom was the award made?

A. This does not show to whom the award was

made. It shows the apparent low bidder as being the Oregon Portland Cement Company.

Q. And what was their mill price?

A. Their mill price was $2.50.

Q. In other words, it was 70 cents above the low price of $1.80, was it not?

A. Yes.

Q. And that was figured in what way? How did you arrive then at the basis for a comparison of the bids?

A. By adding the best available freight rates, less discount in sack loads.

Q. Thus you determined the lowest cost to the Government delivered at the destination?

A. That is correct.

Q. Now you will observe on the second page of this exhibit, which is marked "Commission's Exhibit 127-B", you have a paragraph reciting how you arrived at the lowest bid, have you not?

A. Yes.

Q. Now suppose you just read that paragraph, read it into the record, if you please.

A. This covers Items 2, 3 and 4, which are different from the paragraph already referred to.

1319 Q. All right, just read the paragraph.

A. "The low bid is, therefore, $2 per barrel, or $60,000 for 30,000 barrels submitted by both the Monolith Portland Midwest Company shipping from Laramie, Wyoming, and the South Dakota State Cement Commission shipping from Rapid City, South Dakota, with the resulting net cost to the Government of $2.279 per barrel, or $68,370 for the 30,000 barrels. On the basis of local preference the Monolith Portland Midwest Company should receive the award."

Q. Now in that instance the lowest f. o. b. mill price was $1.80 submitted by the Henry Cowell Lime & Cement Company, was that not so?

A. That is right.

1321 Q. So that in determining whom the award is to be made to every bidder is aware that what the Government wants to determine in comparing the bids for the purpose of making the award is the cost at the destination to the Government?

A. So I understand.

Q. Yes.

A. That is stated in the specifications.

Q. And all of that includes the question of transportation costs from the shipping point to the point of destination; does it not?

A. The Government must know the cost of shipment, yes.

Q. And the bidders, in order to make their bids attractive, must also know that, must they not?

A. Yes.

Q. You take that into consideration?

A. They should know it, yes.

1322 Q. And should take it into consideration?

A. If I was a shipper I certainly would look into rates.

Q. You would try to take those into consideration always in making you bid, would not you?

A. Possibly, yes.

Redirect Examination by Mr. Wooden.

Q. Mr. Taylor, are there some times when you might want to buy f. o. b. mill without knowing just where you wanted to use it?

A. Yes, that is quite often the case. We may want to ship cement in small quantities to more than one project.

Q. And sometimes then you may want to do your own figuring, after you buy the cement, of what the destination cost will be at various places?

A. Yes. The shipment depends on the needs of these various projects, and the orders for shipment are usually—or, rather, requests for shipment are usually made by the construction engineer who is familiar with the progress of the work, and that requires cement to be shipped to various projects.

Q. Is there any advantage in buying from a nearby mill, in the way of service and quick delivery, or anything of that kind?

1323 A. I would say so.

Q. Does that enter into your consideration of the matter of local preference?

A. Yes, it could. According to our specifications, as I recall the wording, we have considerable leeway in what we refer to as equalizing elements in making the award.

to determine the low bidder, other than just the computation of freight costs.

Q. Well, does that means that you are interested in getting bids primarily at the price at the mill and then do your own figuring as to what it will cost to deliver it at a certain place?

A. We certainly prefer f. o. b. mill bids, unless we can get a lower bid, destination bid, shipping on commercial bill of lading.

Q. Of course every buyer is interested in knowing what the costs to him laid down at the place he wants it are.

A. He certainly should know, yes.

Mr. Wooden: Your Honor, while we are on this subject I would like to call attention to Exhibit 95-B, which is a portion of the circular issued by Mr. Reiter, the general manager of the Cement Institute, dated January 2, 1936, on the subject of land grant rates.

Mr. Zimmerman: 95-B?

Mr. Wooden: Yes. I would like to read this para-
1324 graph:

"During the N. R. A. code period when all cement manufacturers were required to file their prices and terms of sale, the methods which the different companies followed in bidding on Government business was a matter of public record. It became evident that many of the companies labored under difficulties, since it seemed that they were unwilling to deviate from their long established practice of quoting destination prices and yet bids of this nature would not assure to the Government the benefit of the land grant rates."

Examiner Norwood: What is the paper you read from?

Mr. Wooden: A circular of the Institute by the General Manager, dated January 2, 1936, Exhibit 95-B is the page from which I read. I have nothing further.

Rerecross Examination by Mr. Leisure.

Q. Mr. Taylor, just one question. Mr. Wooden asked you if you sometimes bought cement without knowing where you wanted to use it. You did not mean that the Government would buy cement without knowing what they wanted to do with it, did you?

A. No, I mean without stating the destination.

Q. Yes.

A. Of course the Government knew of the projects.

1325; Q. Precisely.

A. The Government knew of the project for the particular invitations.

Q. Yes. You knew exactly what project the cement would be used in when you bought it?

A. Yes. Although I might qualify that by saying that there would be instances—we have a number of projects and they require cement at certain times to keep the orderly progress of the work, there would be possibly instances where we might buy cement from a certain mill and it could be shipped to any project, but that is not the rule.

Q. That would be very rare, would it not?

A. Yes, but it is possible.

Q. By and large you would buy the cement for a specific project?

A. Yes.

Mr. Leisure: That is all.

1327 Mr. Zimmerman: May it please Your Honor, Mr. Wooden has read from Commission's Exhibit 95 a paragraph from the page which is marked 95-B. I desire to read the subsequent paragraph next adjoining the one he read.

Mr. Wooden: No objection, sir.

Mr. Zimmerman (reading): "In the code days, companies which did not desire to quote f. o. b. mill prices to the Government filed their bids with certain control clauses, and as these conditions were made public other companies either adopted them or made certain changes. The result was that it became a widely prevalent practice, in the case of bids to the United States Government, for cement companies to quote what was called a 'Government destination cost.'

"In bidding a Government destination cost it was the practice of the individual company to quote a figure which was based upon the mill net return (that the company was satisfied with in the particular case) to which was added the land grant or special rate to the destination. In the absence of exact information regarding the applicable land grant rate the company added its best approximation of

that rate. The result was the so-called 'Government
1328 destination cost', which was filed as a bid on the condition that the Government could determine the bidder's mill price (for purposes of invoicing) by subtracting the actual land grant rate or some other specified amount."

FRANK J. BERGIN, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am an attorney in the Solicitor's office of the Interior Department, assigned to the Bureau of Reclamation
1329 and have been there about 5 years. Prior to that time, I was an attorney in the Bureau of Reclamation. The nature and scope of my duties and functions during the time I was with the Bureau of Reclamation could best be described to the understanding of the persons present as being of the character of the work we have been discussing with Mr. Taylor, except that for the last 5 years I have had nothing to do with that work. That is, I have had nothing to do with the matter of cement bids or awards since approximately 1932. The scope and nature of my duties in the Bureau up to 1932 involved the legal work of the Bureau together with two other attorneys. I had experience particularly with the type of work which
1330 involves bids, specifications and awards on a large number of commodities on all projects including the bids and awards on cement. I was performing such functions at the time the bids on the Boulder Dam cement requirements were considered by the Bureau at the beginning of the construction and running up until approximately 1932.

Q. Can you fix the time, approximately, when the first bids on Boulder Dam cement were considered by your Bureau?

A. That is for cement?

Q. Yes.

A. Only approximately. I should say it was in 1932. Of course you are asking me to go back five years.

Q. Yes, I understand.

1331 The witness identified Com. Ex. 128 A to H as a copy of a letter dated January 2, 1932 at Los An-

geles, addressed to the Bureau of Reclamation at Denver, Colorado, and signed jointly by E. E. Duque, president, and L. E. Bancroft, secretary of California, by Monolith, Riverside, and Southwestern. He said that the last paragraph states: "The foregoing agreement is approved as to form and validity by O'Melvany, Tuller & Myers, by Louis W. Myers; and Hall & Murray." He said
1332 that among those papers there is an agreement dated January 2, 1932 by and between California, Monolith, Riverside and Southwestern.

(COM. EX. 128-A to H was offered and received in evidence.)

1333 Q. Showing you now a paper marked Commission's Exhibit 129 for identification, will you state what it is?

A. It is a photostatic copy of an abstract of bids for cement for Boulder Canyon project, advertisement No. 3333A, opened January 5, 1932.

Q. Does that relate to the same bidding that is covered by Commission's Exhibit 128-A to H?

A. Yes, sir, that does.

1334 Q. Is this Exhibit 129 a photostatic copy of the official abstract of the bids that were made and on which your office predicated its action?

A. Not in our office, no. This is a photostatic copy of an abstract prepared by the purchasing agent of the Bureau at Denver, Colorado.

Q. Submitted here? Was it used, or what use was made of it here by your people in the Washington office?

A. That involves a lot of territory that I could not testify with regard to. For my purpose, it came to me after having been checked by the engineers against the bids. No corrections are made, so that I would therefore assume that the checking was satisfactory.

Mr. Wooden: I offer it for the record.

Mr. Leisure: If Your Honor please, I am willing for the government to save all of the time it can in way of offering abstracts, but I do think that we should be afforded the opportunity of offering the rest of the picture if we find we want to offer it. With regard to this abstract Exhibit 129, from the witness' testimony it shows that it has gone through three hands to him. I don't know whether he knows whether this is all of the business or not, but certainly we should have the right to see the invitations and

the bids, and on that basis an abstract might be
1335 offered, but at this time I think it is incompetent.

Mr. Wooden: The purchasing agent's certification is that it is a true and correct abstract of all the bids received.

Mr. Leisure: Yes, it is for all the bids received. Now, as to those bids, we would want to see the invitations, of course, and the bids.

Examiner Norwood: Where are they? Can you tell us where they are, the bids and the invitations?

The Witness: The bids ought to be in the General Accounting Office in the Returns Office.

Examiner Norwood: Here in Washington?

The Witness: Yes.

(Discussion off the record.)

Mr. Wooden: I offer Exhibit 129 for identification in evidence.

Examiner Norwood: Off the record—

(Discussion off the record.)

Examiner Norwood: I shall receive it in evidence with the distinct understanding that counsel for the Commission will produce such of them as he can, or if that be impossible, to see that counsel for the respondents have access to the files in Washington.

Mr. Wooden: I will do the best I can, but if they want to check the correctness of the abstract, their own
1336 clients have got all of that in their files that could be checked against this much more readily and with less trouble to everybody concerned than to haul a pile of bids down here from the General Accounting Office.

Mr. Leisure: I have already stated that it was not merely wanting to check the abstracts. If we allow him to offer abstracts in evidence, surely he should be willing to make available to us the originals from which the abstracts are made, and we should have the opportunity of having that available for cross-examination. There is still outstanding on this question of abstracts, the question of examining other files, and our two representatives were told that they must get the consent of the Secretary of the Interior. By the time we get his personal consent, the witness has left the stand and we cannot cross examine then, so that it is a hardship placed upon us which should not be done when abstracts are being offered.

Examiner Norwood: I will overrule your objection,

and admit it subject to your being permitted to examine these original records, and in case you are denied them, the exhibit will not be considered.

(COM. EX. 129 was offered and received in evidence.)

1338 By Mr. Wooden:

Q. Mr. Bergin, showing you papers marked for identification as Commission's Exhibits 130-A, B, C and D, will you state what they are (handing documents to the witness)?

A. The first paper is a photostat copy of the bid dated January 2, 1932, by the Riverside Cement Company, California Portland Cement Company, Southwestern Portland Cement Company and Monolith Portland Cement Company.

Q. May I possibly shorten it up by asking you whether those papers include the invitation, specifications, and the copy of the original bid?

A. Yes, they do.

Mr. Wooden: Now it is immaterial to me whether
1339 these go into the record or not, but they are submitted as some of the underlying material from which the abstract was made.

Mr. Leisure: Unless counsel thinks they are important to the record I would rather not have them marked in evidence, but merely having them made available by carrying a number for identification.

Mr. Wooden: That is satisfactory. I prefer not to offer them also.

Examiner Norwood: Commission's Exhibits 130-A, B, C and D for identification relate to Commission's Exhibit 129, do they?

Mr. Wooden: Yes, Your Honor.

Examiner Norwood: All right.

The witness identified Com. Ex. 131A, B and C as a decision dated February 8, 1932 by the Comptroller General
of the United States addressed to the Secretary of
1340 the Interior. It relates to bids submitted under Invitation No. 3333-A. Those are the ones which are included in Com. Ex. 129.

Mr. Wooden: I will offer this for the record.

Examiner Norwood: It is marked Exhibit 131-A to C?

Mr. Wooden: Yes.

Mr. Leisure: We make the same objection, Your Honor, to the offer now that we made this morning, that Commis-

sion's Exhibit 131-A for identification is incompetent, irrelevant and immaterial, being a writing or a memorandum or letter passing between two departments of the Government, which of course can not be binding upon any of these respondents.

Examiner Norwood: That relates to the letter shown in Commission's Exhibit 129, previously so marked?

Mr. Wooden: That is right, Your Honor. It is the opinion that has been published by the Comptroller General on that subject. This is a file copy of the opinion from the Interior Department about it.

Examiner Norwood: Well, those fellows had notice of that decision, did they?

Mr. Wooden: How?

1341 Examiner Norwood: It is a matter of public record?

Mr. Wooden: It is a published decision.

By Mr. Wooden:

Q. It has been printed, has it not, Mr. Bergin?

A. I do not know whether it is a published decision. They do not publish all the decisions.

Mr. Wooden: I can say it was published in the Federal Trade Commission's report of 1933 at least.

Mr. Zimmerman: On page 169 thereof.

By Mr. Wooden:

Q. Mr. Bergin, will you tell, just in your own words so that it may be readily understood, just what happened in connection with the bids on that particular project? How they came in, what you did with them, and so on; what the final handling and decision on the matter was?

A. The bids under this invitation, which is Invitation No. 3333-A for 5,000 barrels of cement in cloth sacks and 375,000 barrels of cement in bulk, were opened at the Den-

ver office of the Bureau on January 5, 1932. They-

1342 are examined in the Denver office and an abstract of the bids prepared, all papers then being forwarded by the chief engineer of the Bureau at Denver to the Washington office, with recommendations for award.

Q. Will you state what consideration was given to them in the Bureau here? What the Bureau did with the bids before deciding how to make the award and how the award finally was made?

A. Well, it was noted that a joint bid was submitted by four Southern California cement companies. The ques-

tion of a joint bid by four companies immediately arose, and there being doubt in the minds of the Washington officials the matter was presented by letter of January 19, 1932, to the Comptroller General with a request for decision.

Q. Can you say whether or not, in presenting it for decision, you raised the question as to whether a joint bid by the four companies constituted an agreement to suppress competition in that particular case?

A. The question was raised with respect to Section 3709 of the Revised Statutes, the direct question being stated here, as to whether or not a joint bid would be permissible in view of that statute.

Q. Well, by reference to the opinion which quotes your letter, can you say whether or not the question was raised as to whether this joint bid constituted an agreement
1343 by which competition was lost?

The Witness: Will you read that?

(The question was read.)

A. That was the question we presented to the Comptroller General.

Q. Will you state in your own words how that question was decided by the Comptroller General?

A. Could I not tell you how it was decided in the words of the Comptroller General?

Q. All right.

A. The Comptroller General says, "The provisions of Section 3709, Revised Statutes, do not require objection by this office to the consideration of such a joint and several bid in making the award, assuming, of course, there appears nothing suggesting possible violation of other laws."

Q. Did you consider whether there was a possible violation of any other laws?

A. Now you are asking me personally?

Q. Can you answer either way?

A. I could not answer for the office, and personally I can not.

Q. You can not answer for the office either?

A. No. This happened five years ago.

Q. Can you say whether or not your office asked the opinion of the Attorney General, or any other Gov-
1344 ernment official, as to whether there were other laws that might be involved?

A. Not to my knowledge.

Q. What was done as to making the award? How was the award made, in other words?

A. After the Comptroller General ruled that the short bid was permissible it was made upon recommendations to the Secretary of the Interior to the low bidders.

Q. Referring to the handwriting which you said was yours, in the margin of this Exhibit 131-C, will you read it and then explain its application?

A. It is easy enough to read it. It is this: "How about bidders who offered to supply all," the "all" being underlined. I am perfectly satisfied that that is my handwriting, but I wrote it almost six years ago.

Q. Can you explain its application to the subject-matter of the opinion?

A. Well, the only explanation I can make is that the underlining of the word "all" seems to suggest that the argument which the Comptroller General was making is applicable only to the stated circumstances he names, and we were raising the question as to the status of those bidders who offered to submit all the cement as against those who were offering partial compliance only, or partial supplies only.

Q. Did you have some bidders in that case that did offer to supply all the cement?

1345 A. I could not say without the papers.

Q. There is the abstract (handing document to the witness).

A. I see no limitation with respect to some of the bids.

Q. Will you name them?

A. You want me to read them?

Q. Will you name the ones that apparently placed no limitation upon the quantity they would supply?

A. The Pacific Portland Cement Company states a maximum daily and a maximum monthly delivery.

Q. I mean those which did not place any limitation upon the quantity they would supply, the total quantity.

A. The Henry Cowell Lime & Cement Company agreed to furnish the amount specified in the invitation.

Q. The total amount?

A. Yes. The same with the Calaveras Cement Company. The same with the Union Portland Cement Company.

Q. Of what place?

A. Union Portland Cement Company. The same with the Utah-Idaho Cement Company; also the Kosmos Portland Cement Company, and the Oregon Portland Cement Company.

Q. Is it or is it not a fact that most of those you named, however, were high on their bids as compared with the joint bid of the four Southern California companies?

A. They are.

Q. How about the Union Company? Was it high?

1346 A. The Union Portland Cement Company?

Q. Yes.

A. That seems to have been the highest.

Q. Am I wrong in thinking that the Union did get an allotment? According to the abstract they were quoting on 200,000 barrels only, is that right?

A. Yes, the Union Portland quoted on that amount named.

Q. Now there is some company over in there that was awarded part of the contract. Is that the Union or is that the Idaho?

A. That is the Utah-Idaho Company, bidding on 40,000 barrels only.

The witness identified Com. Ex. 132 A to E as a letter dated April 28, 1933 from the Acting Chief Engineer at Denver to the Commissioner at Washington reporting on bids submitted under Specifications No. 590-D,

1347 Boulder Canyon project. In order to determine what quantity was involved, he said he would have to read the letter very carefully. "If you had a specification it states the amount involved". "That is a long

1349 explanation with respect to the individual bids". He said 400,000 barrels is the total stated.

Q. Did the matters involved in this exhibit cross your desk or were they passed on or handled by you in any way?

A. It is not possible for me to tell from this paper, in other words, I don't remember as of five years ago whether I had the original of this paper or not.

Q. Do you remember in general the circumstances of the bids and award on this particular proposition? It is another Boulder Dam purchase, I believe.

A. I could not tell from this paper. (Examining) I am sorry.

Q. Can you say whether or not this purchase involved the purchase of a special low heat cement or the standard cement?

A. I could not tell without reading the paper. I will be glad to do that.

1350 Q. Can you refresh your recollection from it in any way?

A. If there is something about that in it.

Q. I think there is. (Handing paper to witness.)

A. (Witness examining paper.) I cannot remember now with respect to something that did not particularly attract my attention. Here is a statement which says, "It was anticipated that the Union Portland Cement Company and the four southern California companies would be the low bidders for the special low heat cement called for by specifications 590-D."

Q. Does the exhibit contain a discussion of the price differentials between special low heat cement and standardized cement?

A. Does this exhibit?

Q. Yes.

1359 EVERETTE MAC INTYRE, a witness having been previously sworn, was recalled to the stand and testified further as follows:

1360 *Direct Examination by Mr. Wooden.*

The witness identified Com. Ex. 133-A and B as photostats of two documents furnished to him by Mr. George H. Reiter of the Cement Institute that the selected from the files in Reiter's office on June 22, 1934. They bear identifying marks that he placed on them at the time before he made his photostats, that is, that were placed on the documents that he selected before he made his photostats of the same.

1361 (COM. EX. 133-A and B was offered and received in evidence.)

FRANK J. BERGIN was recalled as a witness for the Commission and, having been previously duly sworn, testified further as follows:

1362 *Direct Examination by Mr. Wooden (Continued).*

Q. Mr. Bergin, showing you papers marked Commission's Exhibits 134-A to G, inclusive, will you state what those papers are (handing documents to the witness)?

A. The first is a photostat copy of a letter addressed to the Secretary of the Interior dated April 6, 1934, by the Commissioner of the Bureau of Reclamation recommending award under Specifications No. 566 on bids opened at Denver, March 26, 1934, for 1,500,000 barrels of cement. Is that enough for the first paper?

Q. Yes.

A. The second is an abstract of the bids received in answer to that invitation.

1363 (COM. EX. 134-A to G was offered and received in evidence.)

Q. Does Commission's Exhibit 134-A bear a

1364 stamp containing your name?

A. Yes, it does.

Q. With a check mark alongside of it?

A. Yes.

Q. What does that mean?

A. Well, that indicates either that I checked it off or that somebody checked it off for me as being through the paper. I honestly do not remember the paper.

1365 Q. What about that, Mr. Bergin?

A. What you last said?

Q. Yes.

Mr. Wooden: Will you read my question?

(The question was read.)

A. Yes, they are.

Mr. Wooden: And he has testified having his name or his initials on one of them which he checked.

By Mr. Wooden:

Q. Was it your custom to put your initials on papers that you handled?

A. Well, these initials, this stamped name is put on

by the person who distributes the mail. I am perfectly willing to cooperate in every way I can, but this is a paper which, if I saw it in 1934, I have never seen since. I have had nothing to do with the awards of contracts of this character,—I thought it was five or six years, maybe it is four, but in any event I do not remember the papers.

I should like to be able to say this on behalf of the Bureau, that we wish to cooperate. We selected two men, one an attorney and one an engineer, to furnish all information called for, together with certified copies of papers, and those men, so far as I know, did that. I had nothing to do with the papers in any way, and natur-
1366 ally I think it is asking a little too much for me to try to remember what has happed four or five years ago, especially since I have had nothing to do with this business.

Q. I am mindful of your limitations.

A. What is that?

Q. I am mindful of your limitations in that respect and I do not want to transgress upon it. Until the point was made I had forgotten about the time that you ceased the active handling of these matters, but then I was attracted by the fact that there was that check-mark opposite your initials.

Mr. Wooden: For your information, Your Honor, I want to make a few observations regarding these last two exhibits. The abstract of bids in the record, 134-C, shows that the four Southern California companies named submitted a bid f. o. b. mill for low heat cement of $1.49 per barrel at the mill, and $1.43 per barrel for the standard cement; figuring out a delivered price of $2.242 for the low heat cement and $2.182 for the standard cement. Five days before those bids were opened the four com-
1367 panies, according to Exhibit 133-A, notified the code authority that they were bidding $1.49 and $1.43 on those two grades of cement for this particular project. According to Exhibit 133-B the code authority notified other companies of these bids of the four Southern California companies. Included among those notified were the Calaveras Cement Company, the Powell Cement Company, Charles Boetcher, president of the Ideal Cement Company, Portland Cement Company of Utah, Yosemite Portland Cement Corporation, Pacific Portland Cement Company, Santa Cruz Portland Cement Company. The only two

of those others notified to bid were the Union Portland Cement Company of Denver, which is, I believe, an affiliated concern of Mr. Boetcher's, and the Calaveras Cement Company of San Francisco.

The Union Portland Cement Company bid a mill price of $1.2644 on the low heat cement, but the delivered price figured out to $2.2420, which was identical with the $2.242 price of the four Southern California companies.

The Union Company on the Standard cement bid $1.2044 at the mill, the delivered equivalent of which was $2.182, identical with the $2.182 quoted by the four Southern California Companies.

The Calaveras Cement Company bid $1.55 at the 1368 mill for low heat cement and $1.50 for standard.

With freight added it was $2.7344 on the first and $2.6844 on the second, being very much higher than the others. Whether or not that bid was filed in ignorance of the other bids or maybe higher notwithstanding its knowledge of the other bids does not appear.

Examiner Norwood: That relates to Exhibits 134-A to G?

Mr. Wooden. I think so. It relates to two exhibits, 133 and 134-A to G.

Examiner Norwood: In regard to that Exhibit 134-A to G it appears here that this witness does not know anything about it.

Mr. Wooden: That is true, and that is why I asked no further questions and went to the exhibit itself. He did identify it I thought sufficiently for me to offer it.

Examiner Norwood: I was not clear on that. I will not reverse my ruling on that until I see the record and see that it is not properly identified.

Mr. Wooden: All right, but I understood the witness to say that these were photostats of official documents from the files of their department.

By Mr. Wooden:

Q. Is that right?

1369 A. Yes.

Mr. Wooden: Before I pass on, Your Honor, I should like to also call your attention to the fact that according to Exhibit 134-E, the four Southern California companies originally bid on the entire 1,500,000 barrels; that appears to be crossed out and 1,400,000 barrels inserted instead, and corresponding changes made in the al-

lotment to each of the four companies and to the total amount bid. According to 134-G the Union Portland Cement Company made its quotation apply only to 100,000 barrels.

Q. Mr. Bergin, I show you two papers marked Commission's Exhibits 135-A and B. Can you say what they are (handing documents to the witness)?

A. Exhibit 135-A is a letter addressed to the Secretary of the Interior April 28, 1937, by the Commissioner of Bureau of Reclamation, recommending award of the bids submitted by the Union Portland Cement Company of Denver in the amount of $1.40 per barrel f. o. b. mill with net delivered cost of $2.388 per barrel.

1370 Q. Well, you do not need to go into the contents.

A. The other is an abstract of the bids received in answer to this invitation.

Q. Are those photostats of records in the files of your Bureau?

A. They are.

Cross-Examination by Mr. Leisure.

Q. Mr. Bergin, on the Commission's Exhibits 129, the abstract No. 3333-A, will you just look at Items 1 and 2 and state for the record the amounts? (Handing documents to the witness.) For instance, the Pacific Portland Company, what was the bid there?

A. On Item 1 $1.90; with freight added, $3.154.

1371 Q. Now what was the amount of the bid with freight added on the Henry Cowell Lime & Cement Company bid?

A. $2.854.

Q. And for the Calaveras Cement Company?

A. $3.304.

Q. And for the Union Portland Cement Company?

A. $3.09.

Q. And for the Kosmos Portland Cement Company?

A. $5.64338.

Q. And for the Oregon Portland Cement Company?

A. $5.5291.

Q. Now take those companies for Item No. 2. We skipped in Item No. 1 the four Los Angeles companies. Would you mind giving us the total bid on that with freight added?

A. The total with freight is $2.73.

Q. Now take Item 2 and tell us about the joint bid of the four California companies.

A. That was $2.22.

Q. And that was with freight added?

A. With freight added.

Q. And the Pacific Portland Company?

A. $2.7408.

Q. And the Henry Cowell Lime & Cement Company?

A. $2.4408.

Q. And the Calaveras Cement Company?

1372 A. $2.8908.

Q. The Union Portland Cement Company?

A. $2.2104.

Q. And the Utah-Idaho Cement Company?

A. That was the last one, $2.2104.

Q. Is that what you gave? There is no bid under Union Portland Cement Company?

A. Yes, that is right, no bid under the Union Portland.

Q. So that your previous answer applied to the Utah-Idaho Cement Company?

A. That is right.

Q. Would you give us the Kosmos Portland Cement Company?

A. $5.103976.

Q. And the Oregon-Portland Cement Company?

A. $4.5632.

1377 Mr. Wooden: Then with regard to Commission's Exhibits for Identification 49 to 81, consisting of a collection of material relating to the Indiana Farm Bureau transaction during the summer of 1936, which were marked for identification only and I think were offered, but whether offered or not they were left with respondents' counsel for examination, and I now make the offer of those exhibits.

Mr. Leisure: We have gone over them, Your Honor, and we object to them as being incompetent, irrelevant and immaterial; for the further ground that no proper basis is laid for their introduction in evidence.

1379 Washington, D. C.,
Wednesday, January 5, 1938.

1380 In regard to these exhibits, Commission's Exhibits 16-A to 16-C, I have looked over them carefully and studied the record with regard to them. They are received in evidence as Commission's Exhibits 16-A to 16-C.

(COM. EX. 16-A—16-B—16-C was offered and received in evidence.)

Examiner Norwood: The exhibits for identification, Commission's Exhibits 49 to 81, inclusive, the same statement applies to them and they are received in evidence as Commission's exhibits 49 to 81, inclusive.

1381 (COM. EX. 49 to 81 were offered and received in evidence.)

R. F. MILWEE, JR., called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am employed at present as an attorney by the Securities & Exchange Commission attached to the Ft. Worth, Texas, Regional Office. I was employed as an attor-
1382 ney-examiner by the Federal Trade Commission from approximately March 1931 until September 1934. During the time I was employed by the Federal Trade Commission I had occasion, in the course of my official duties to make an investigation of the cement industry. From approximately April or May 1931 until some time in the spring of 1932, I was assigned by the chief examiner to be engaged in the investigatory phases of the investigation of the cement manufacturers.

Q. Do you know how the investigation of which you were then engaged originated?

1383 It originated directly as the result of a Senate resolution by Senator Norris directed to the Federal Trade Commission to conduct an investigation of the cement industry, to determine whether or not it was engaged in practices which constituted a violation of the law.

By Mr. Wooden:

Q. Now, will you state, just in a general way, what
1384 you did in the course of that investigation?

A. I was engaged in field work, calling on various cement manufacturers, examining the files, interviewing officials of the cement companies, also contacted various dealers, cement dealers.

Q. Did you go into different parts of the country?

A. I did, yes, sir.

Q. Will you give us an idea as to just how much territory you covered, from a geographical standpoint?

A. I began in New York in May, 1931, at the offices of the Cement Institute; from there to Chicago, a little work in the Midwest and Rocky Mountain country around Denver, from there to the West Coast, and on up to Seattle.

Q. To what extent did you work alone and to what extent did you work with any other employees of the Commission?

A. Originally I worked with I. D. Royal in New York and Chicago, and in certain portions of the Middlewest, on the West Coast Mr. Royal and I, as I recall, divided up there and we worked separately.

Q. Do I understand that you worked together in New York in connection with the Institute file investigation?

A. Yes, sir, Mr. Royal and I called jointly at the offices of the Cement Institute in New York.

Mr. Wooden: I ask to have these marked Commission's Exhibits 136-1 to 136-64.

1385 (The documents referred to were thereupon marked for identification "Commission's Exhibit 136-1 to 136-64 inclusive.")

The witness identified Com. Ex. 136-1 to 136-64 as copies of minutes of the Cement Institute for the period shown, which were made available to Mr. Royal and him by Mr. Lundborg of New York. In May 1931 Mr. Lundborg was the manager of the Northeastern division of the Cement Institute and secretary of the board of trustees.

Q. Are the minutes, of which you say those papers are copies, are they minutes of the entire Institute or of some particular section or subdivision of the Institute?

A. Some of the minutes appear to be minutes of the board of trustees of the Cement Institute and others do not disclose whether they are merely minutes of the board of trustees or not.

Q. Were those, as I understand it, obtained at the New York office of the Institute?

A. Yes, sir.

1386 Q. You say they are copies. Do you know who made the copies?

A. Some of them are typewritten copies and others are mimeographed copies. No, I do not know.

Q. As to the mimeographed copies, can you say how they came into your possession?

A. Made available to us by Mr. Lundborg.

Mr. Wooden: Your Honor, I do not care to offer this exhibit at this time. I am taking advantage of Mr. Milwee's temporary availability here in the city to merely identify the papers that may or may not be offered. I can say that some will be and some will not. I do not know which will be as yet.

Mr. Leisure: Then may I ask some questions about the exhibits while he is here?

Mr. Wooden: Yes.

By Mr. Leisure:

Q. What portion, Mr. Milwee, of those exhibits are the ones that you actually took from the files and the ones that you copied? I just want to be sure about the authenticity of the documents.

A. I do not believe we got copies of any of these.

Examiner Norwood: Designate the pages there.

The Witness: I do not believe we got copies of any of these. I think they were given to us by Mr. Lundborg.

1387 He either gave us the mimeographed copies that he had in the files or had the typewritten copies made himself.

By Mr. Leisure:

Q. He gave them to you?

A. Yes, sir.

Q. That applies to this entire exhibit?

A. It does, yes, sir.

The witness identified Com. Ex. 137-1 to 137-22 as copies of minutes of the meetings of the members of the Cement Institute, Chicago Division, which were made available to him by Mr. Foster, manager of the Chicago Division of the Cement Institute in May 1931. Some of them

1388 are mimeographed and others are typewritten and they were prepared by the Chicago office of the Ce-

ment Institute. The witness said that those that were mimeographed were given to him by Mr. Foster in that form. Some of those marked Com. Ex. 136-1 to 136-64 are mimeographed and they were given to him in that form.

Mr. Wooden: Here likewise, your Honor, I will defer making an offer of any portion of this exhibit.

Examiner Norwood: All right.

1389 The witness identified Com. Ex. 138 1-8 as a mimeographed copy of Code of Ethics of Cement Institute which he obtained from Mr. Lundborg of New Work; Com. Ex. 138 9-21 as a mimeographed copy of Articles of Association of Cement Institute obtained from Mr. Lundborg; Com. Ex. 138 22-23 as a photostatic copy setting forth the purpose of Cement Institute as stated in Articles of Association obtained by him from Mr. Lundborg in New York; Com. Ex. 138 24-27 as a mimeographed copy of memorandum directed to field representatives containing information with respect to the purposes of Cement Institute as set forth in Articles of Association obtained from Mr. Lundborg in New York. He said that he had identify-

1390 ing marks on not only these papers but on others that indicated to him where they were obtained. Those marks are on the reverse on the photostatic copies showing they were taken from Mr. Lundborg. That applies to previous exhibits as well. The mark is "Lundborg, New York."

Mr. Zimmerman: If the Examiner please, may I ask if this witness is supposed to have any information regarding these documents other than what he reads from? Is this a matter of recollection or is it simply reading from the documents to find out what they are?

Examiner Norwood: I think he brought that out, that he put his own identifying marks on the back of them.

Mr. Zimmerman: But he does not seem to know what they are without looking at them.

Mr. Wooden: I do not see how anybody could know that.

Mr. Zimmerman: Then they speak for themselves.

Mr. Wooden: I am not going into the contents.

Examiner Norwood: I should like a little descrip-

1391 tive matter to go in there so that I can identify them when I have to work with them.

Mr. Wooden: Would you prefer to have merely a number without any indication what it relates to, or would you prefer to have it stated?

Mr. Zimmerman: No, but I would be willing for you to state what they are. Perhaps you can do it more shortly.

By Mr. Wooden:

Q. Mr. Milwee, I would be very glad to follow the suggestion made by Mr. Zimmerman, and hereafter just state what the papers are in a general way, without specifying what each particular subject or special number is.

A. 138 28-31 is a typewritten copy entitled "'Cement Institute Rock Products, February 15, 1930,'' setting forth the purposes of the exhibit.

Q. Where did that paper come from?

A. Mr. Lundborg, in New York.

1392 The witness identified Com. Ex. 139 1-10 as photostatic copies of various letters made by the Commission, the originals of which were obtained from Mr. Lundborg; Com. Ex. 139 13 as a photostatis copy of an original letter he obtained from Mr. Foster in Chicago.

Q. (Interposing): Pardon me, Mr. Milwee. I suggested that you try to shorten it by not describing each particular subnumber, but if you can make some overall description about the source of the documents, we will get along faster and at the same time meet Mr. Zimmerman's suggestion.

Mr. Zimmerman: There is no point simply in meeting my suggestion, Mr. Wooden. I did not desire to substitute any recommendation of mine for the better judgment of other counsel in the case. It simply occurred to me that you might know what these documents were and that we might save time by stating what they were. I will be very glad to withdraw the suggestion if it in any way interferes with the way you think that it ought to go. I did not mean to impose my idea on you.

Examiner Norwood: I think a little descriptive
1393 matter which will enable us to find out later on what they are, will save time.

Mr. Wooden: I think that would be better.

Mr. Zimmerman: Let me withdraw the suggestion and apologize for the interruption.

The Witness: These exhibits were taken from Mr. Foster in Chicago, the manager of the Cement Institute there.

Mr. Leisure: When you say, "these exhibits," what do you mean?

The Witness: 139 11-19.

The witness identified Com. Ex. 140 1-36 as photostatic copies of letters obtained from the New York office of the Cement Institute from Mr. Lundborg.
1394 He said that he received the originals from Mr. Lundborg and that these are photostatic copies of of the originals; Com. Ex. 141-1 to 141-65 as
1395 photostatic copies of the original exhibits that Mr. Royal and the witness examined and selected from the files that were made available by Mr. Lundborg who asked that copies be made; Com. Ex. 141-66 to 141-87 as photostatic copies of letters and memoranda obtained from Mr. Foster of Chicago by Mr. Royal and him; Com. Ex. 142 as a photostatic copy of a telegram which Mr. Royal and the witness obtained
1396 from Mr. Lundborg in New York; Com. Ex. 143A and B as photostatic copies of two letters that Mr. Royal and the witness obtained from Mr. Foster in Chicago; Com. Ex. 144A and B as photostatic copies of letters obtained by Mr. Royal and the witness from Mr. Foster in Chicago; Com. Ex. 144B-1 and Com. Ex. 144B-2 as photostatic copies of telegrams received from Mr. Lundborg by Mr. Royal and the witness; Com. Ex. 1440, D and E as photostatic copies of letters received from Mr. Lundborg in New York by Mr. Royal and the witness. They are photostatic copies of letters that Mr. Royal and the witness examined and took from the files; Com. Ex. 145 as
1397 a photostatic copy of a letter that Mr. Royal and the witness took from the files of the Cement Institute in New York through Mr. Lundborg; Com. Ex. 146 as a photostatic copy of a letter from the files of the Cement Institute in New York obtained in the examina-
1398 tion conducted by Mr. Royal and the witness; Com. Ex. 147A, B and C as photostatic copies of letter obtained by the witness from the New York office of the Cement Institute; Com. Ex. 147D as a photostatic copy of a letter obtained by the witness from the Chicago office of the Cement Institute; Com. Ex. 148 as a photostatic copy of a letter taken from the files of the Institute
1399 in New York by Mr. Royal and the witness; Com. Ex. 149A as a photostatic copy of a letter taken by Mr. Royal and the witness from the files of the Cement Institute in New York; Com. Ex. 149B as a photostatic copy of a memorandum from the New York office of the Cement Institute; Com. Ex. 149C as a photostatic copy of a letter

from the files of the Cement Institute in New York; Com. Ex. 149D and Com. Ex. 149E as photostatic copies of original letters taken by Mr. Royal and the witness from the files of the Cement Institute in New York; Com. Ex. 150 as a photostatic copy of a letter taken from the files of the Cement Institute in New York in connection with
1400 "our investigation there"; Com. Ex. 151 as a photostatic copy of a letter taken by Mr. Royal and the witness from the files of the Cement Institute in New York; Com. Ex. 152A to 152B as an interview report with Mr. H. C. Lundborg, manager of the Northeastern Division of the Cenment Institute, prepared jointly by Mr. Royal and the witness relating to their investigation of the Cement Institute in New York; Com. Ex. 152I to 152R as a list of various exhibits taken from the files of
1401 the Cement Institute in New York. The witness would say that the list includes the various papers he has been identifying here this morning. The list shows that it was dated May 23, 1931, and that was the last day that Mr. Royal and the witness were in the New York office. It was probably prepared from a list that the witness had written out in longhand of the exhibits that were taken; Com. Ex. 153A as a photostatic copy of a memorandum directed to members of the Cement Institute taken by Mr. Royal and the witness from the files of the Cement Institute in New York City; Com. Ex. 153B to 153MM as appearing to be copies of various material taken from the New York office of the Institute.

Q. Why do you say "appears to be"?

A. In this connection I do not have any identifying marks on these exhibits 153-B to 153-MM. I know
1402 that they are certain information and material given to us, as Mr. Lundborg stated it was not necessary to return it as it was in the form of mimeographed copies or material that he had other copies of, and for that reason no identifying marks were put on them. But this appears to be from that office.

Q. Well, are you testifying that this material, even without the identifying marks, is among, or was among the material obtained by you and Mr. Royal from Mr. Lundborg?

A. I feel reasonably certain that it is. I have no identifying marks on it.

Q. I am not asking for anything except what is your best knowledge and recollection concerning it.

A. Yes.

Mr. Wooden: Nothing further, I guess.

The Witness: May I make a statement in regard to certain of these exhibits, Mr. Examiner?

Examiner Norwood: Yes.

The Witness: I have just stated that there was certain material that was made available to Mr. Royal and I by Mr. Lundborg that he stated would not be necessary to have copies made and returned to him. On that material I did not make any identifying marks, I did not put any identifying marks on it. Some of that material has already been identified and I want to supplement my testimony in that respect.

1403 Examiner Norwood: Is that material in your list? Was it listed?

The Witness: Yes, sir. I have it here.

Examiner Norwood: In the list that was identified here?

The Witness: Yes, sir. I have the exhibit numbers of that material that did not have any identifying marks on it, but that I feel certain was made available to Mr. Royal and I in New York by Mr. Lundborg. That is minutes of the meeting of the Cement Institute, the code of ethics, articles of association, and minutes of the meetings of the Chicago office. I put no identifying marks on that for the reason that we were advised it was not necessary to have photostatic copies of that material.

Mr. Wooden: I might say in that connection, your Honor, of course there is a description which the witness has given of these papers. They are obviously such papers as are readily available to the respondents in case they are offered in evidence, as I assume some will be offered later. There will be no difficulty in their taking them and ascertaining, or satisfying themselves as to their authenticity.

I have nothing further to ask of Mr. Milwee.

Examiner Norwood: You may examine him.

Mr. Leisure: No questions.

1404 Examiner Norwood: Thank you.

Mr. Wooden: I am informed that the reporter, in numbering the exhibits, omitted these numbers: Exhibit No. 136-50, Exhibit 136-25 and 136-26.

Examiner Norwood: He omitted those numbers?

Mr. Wooden: Yes, inadvertently, in running through the large number he skipped those numbers.

Mr. Hershberger: Does that mean that the numbers are going to be different than 136-1 to 136-64?

Examiner Norwood: He means that there will be no papers with those marks on them.

Mr. Zimmerman: If the Examiner please, there will be no question of this witness now, but I take it he will be available if and when any of these documents that have been marked for identification are offered for the record.

Mr. Wooden: For what purpose, may I ask, your Honor?

Mr. Zimmerman: The usual and customary purpose. The documents which the witness has undertaken to identify, if and when any of them are offered for the record, the witness should be available for the usual and customary examination.

Mr. Wooden: He may be questioned now about his identification in any way that respondent's counsel desire.

1405 Mr. Zimmerman: There is nothing to question him on as to identification at the present time.

Mr. Wooden: That is all he has testified to.

Examiner Norwood: Are these papers now available to the counsel for the respondents?

Mr. Wooden: No, your Honor, they are not offered as yet. As I stated, it is anticipated that a very large proportion of the exhibits will not be offered. That depends upon the circumstances.

Examiner Norwood: I think they have a right to cross-examine this witness even on his identification. We will settle that when it comes up.

Mr. Wooden: I do not think that is true; at the same time I have no thought of interfering with any cross-examination of the witness as to the matters concerning which he has testified.

Mr. Smith: Exhibit 152 is a report of an interview. It is obvious we have a right to cross-examine as to that.

Mr. Wooden: You can cross-examine him as to his identification of it. The contents are not sought to be put in evidence now.

1406 *Cross-Examination by Mr. Hershberger.*

Q. Mr. Milwee, as I understand it, all of these exhibits that have been identified, with the exception of 152-A to R are either letters or telegrams or documents of some kind but this 152-A to R is a report written up by somebody of an interview which you and Mr. Royal had with Mr. Lundborg, is that correct?

A. I do not know that that is the correct number, but there was an interview.

Q. Will you check whether that is correct or not?

Examiner Norwood: That is 152-A to H.

The Witness: That is a copy of a report of an interview that Mr. Royal and I had with Mr. Lundborg.

By Mr. Hershberger:

Q. Who made that report? Who wrote the report?

A. I think it was actually typed up by Mr. Royal.

Q. Did you have anything to do with the preparation of it?

A. Collaborated with him on it.

Q. When was it made? Is it dated?

A. No, it does not appear to be dated.

1407 Q. Do you know whether or not it was made at the time of the interview or some time following the interview, or just how near the interview that it purports to report?

A. I would say it was made within a very few days after the date of the interview.

Q. Had you read that exhibit before you now see it, since it was written? In other words, have you ever seen it before?

A. Yes, I think I saw it at the time it was typed up.

Q. And that was within a few days after the interview?

A. That was our customary practice after we had called and made the examination and interviewed the party in charge of the records.

Q. Do you know whether that is true in this particular instance?

A. It is true in this particular instance? What?

Q. Well, do you know whether the customary practice that you testified to was followed with respect to this particular memorandum of the interview?

A. I feel certain that it was.

Q. Do you know?

A. I don't recall definitely the date this was written, no, sir.

Q. Was Mr. Lundborg present when the interview was written?

A. No.

1409 Q. Is it customary when you write up an interview of that kind, to go back to the party with whom you had the interview and see if he agrees that it is a substantially correct statement, or is that not customary?

A. It has been some time ago since I did that. I do not recall that as a general practice we would do that. Sometimes the occasion may be such that you would want to check certain statements that the party had made to you to ascertain whether or not you had correctly reported them. You do not write this up at the time that you interview the party; you make the notes of course of what he said.

Q. But your best recollection is that this memorandum was not discussed after it was written, with Mr. Lundborg, as far as you are concerned?

A. I did not discuss it with him, no, sir.

Mr. Hershberger: That is all.

The Witness: Mr. Examiner, did I clarify my testimony on these pages sufficiently?

Examiner Norwood: I cannot answer that. That is for the counsel.

Redirect Examination by Mr. Wooden.

Q. If there is anything that you want to say in clarification or supplementation of your testimony as to the identification, please do so.

1410 A. I merely want to supplement my testimony about the copies of the minutes of the meeting in New York and those received from Mr. Foster in Chicago, and also the mimeographed copy of the Code of Ethics and the Articles of Association. Those do not bear any identifying marks by me. I feel that that material was made available to us, and I want to supplement my testimony to that extent. The rest of the material bears identifying marks made by me at the time.

HUGH E. WHITE was recalled as a witness on behalf of the Commission, having been previously sworn, testified further as follows:

Mr. Wooden: You Honor, when the Witness Lemmon from Richmond was on the stand, he identified certain tabulations of cement bids received by his office as Commission's Exhibit 9-A to C inclusive. Accompanying the tabulation that comprised that exhibit, were the original bids from which the tabulation was made. The tabulation was submitted subject to check, and I am now
1411 asking Mr. White if he will state what he has done with that tabulation, Commission's Exhibit 9-A to C inclusive for identification.

The Witness: The supporting documents were checked against this tabulation and found to be correct with the exception that an endeavor was made apparently to correct some of the quotations, or at least one of the quotations, which was not permitted by the Department of Highways.

Direct Examination by Mr. Wooden.

Q. Will you state what that one instance was?

Mr. Leisure: Your Honor, I do not think this witness ought to sit here and tell us how certain people who bid attempted to correct their bids. The proper way to prove that is to call witnesses and prove it so that we can cross-examine them. He does not know anything about the background of how that was done. I object to this line of testimony and rank heresay.

Examiner Norwood: Is he not referring to data that was contained on one of those bids for which this was to be substituted?

Mr. Leisure: It may be data that was shown on one of those bids, but that does not prevent it from being hear-say if he attempts to explain the exhibit and tell
1412 how the figures were arrived at.

Examiner Norwood: Leave that exhibit in and do not withdraw it if there is anything of that kind.

Mr. Wooden: Here is a long tabulation. The witness has checked and found it correct with one exception. The one exception is explained by one of the papers in the supporting data which was made a part of the exhibit

temporarily until the tabulation could be checked, and it is nothing more than checking one portion of that exhibit which was thoroughly identified, and segregating it from the rest and putting it along with the tabulation.

Mr. Leisure: The checking, as I undestood it, was not that the government was going to offer an exhibit in evidence and subject to check it would stay in evidence. They had, I assumed, checked it before they offered it, and it was assumed to be correct when they offered it. As I understood the stipulation, the exhibit was offered subject to our right to check the original documents, and that is the only reason that we waived the ordinary rules of evidence and allowed them to offer a tabulation instead of producing the originals, and we said that we would have no objection to the tabulation provided that we had a right to check it with the originals. It was not
1413 subject to the government's right to check; I assumed they checked it before they offered it. If he is going to attempt now to offer something in addition to that tabulation and have this witness explain why the bid was withdrawn, clearly he is not in a position to give that kind of testimony.

1414 Mr. Leisure: I object to the witness' testimony that there was an apparent effort to withdraw. Your Honor well knows that that is one of the charges in this complaint that we attempted to withdraws bids, and this is not the proper way to prove it, and I object to that testimony on the part of this witness as being incompetent, immaterial and irrelevant and no proper basis being laid for that testimony.

Examiner Norwood: You move to strike that part which has gone into evidence as regards the withdrawal, is that right?

Mr. Leisure: Yes, sir.

Examiner Norwood: I will allow that motion up to
1415 this time.

By Mr. Wooden:

Q. Mr. White, tell us what the exception was that you found on the tabulation when you checked it?

The Witness: I think perhaps my statement should be changed in this respect. I found no errors in the computation, but did find in the supporting data a telegram from the Penn Dixie Cement Corporation.

By Mr. Wooden:

Q. You may state the date of it if you like and to whom.

A. Dated June 26th, addressed to G. T. Lemmon, purchasing agent. It was signed by R. H. Baker, sales manager, dated Chattanooga, June 26, 1937, which reads as follows:—

Q. (Interposing.) No, you do not need to bother with that. Did that telegram have any relationship to the bid of the Penn Dixie Company as shown in the tabula-
1416 tion that is marked Commission's Exhibit 9-A to C inclusive?

1417 Q. What is your testimony as to checking on Exhibit 9-A to C?

A. No errors were found.

Q. No inconsistencies between the basic data and the tabulation?

A. That is right.

1420 Mr. Leisure: Well, I have no objection to this tabulation, Exhibit 9-A, B, and C, your Honor, subject to our right to examine the original bids and the invitations, and if they are found to be correct, we will make no objection.

By Mr. Wooden:

Q. Now, Mr. White, I am showing you Commission's Exhibit 10-A to D inclusive. Have you checked that tabulation?

A. I have.

Q. Will you state the result of your checking?

1421 A. No errors were found in the computation, but there were papers found in the supporting data which indicated an effort to correct one of the quotations.

Q. Mr. White, what are the papers marked for identification as Commission's Exhibit 154-A to E?

1422 A. 154-A is a photostatic copy of a letter—

Q. (Interposing.) You do not need to go into details as to each one if you will make some general characterization of them or description of them as to their source and what they are.

A. It is a letter from the Penn Dixie Cement Corporation—

Mr. Zimmerman: (Interposing.) I do not like to interrupt, but does this witness purport to have any knowledge whatsoever as to where these documents came from?

Mr. Wooden: Yes, they came out of this file here. They came right out of here. (Indicating.) That ought to be apparent, and that file is accounted for as produced by the Witness Lemmon.

Mr. Zimmerman: Yes, but this witness has no knowledge about anything where that file came from or where the documents came from except that Lemmon produced them.

Mr. Wooden: Lemmon testified that these were the original bids.

Mr. Zimmerman: Excuse me, Mr. Lemmon's testimony regarding this has only to do with Exhibits 10-A, B, C, and D purporting to be a tabulation of some bids received in June, 1937, and that is all he had anything to do with.

He did not testify as to anything pertaining to the
1423 matter that you have now suggested to the witness.

Mr. Wooden. He produced the original data for checking purposes.

Mr. Zimmerman: Excuse me. If you will look at the record on page 358, you will find it has to do with Exhibit 10-A, B, C, and D.

The Witness: Signed by R. H. Baker, sales manager, dated June 22, 1937, addressed to G. T. Lemmon, purchasing agent, Department of Highways, Commonwealth of Virginia, the original of which was found in the supporting data.

1424 The Witness: The supporting data being the quotations which accompanied the tabulation submitted by Mr. Lemmon at the time the exhibit was introduced.

1425 The Witness: 154-C is a typed copy of a telegram found in the supporting data referred to, from the Penn Dixie Cement Corporation to G. T. Lemmon, dated June 22, 1937.

Examiner Norwood: Those were the papers which were brought here by that state purchasing agent?

The Witness: They were.

Examiner Norwood: What state was that; Virginia or North Carolina?

The Witness: Virginia.

Examiner Norwood: Never received in evidence?

Mr. Zimmerman: Never offered.

Examiner Norwood: With an agreement that they be withdrawn?

Mr. Wooden: The tabulation was received subject to check against the basic data with the understanding that after checking, the basic data might be returned to the witness then on the stand.

Examiner Norwood: These letters are part of that basic data?

1426 Mr. Wooden: Right.

Mr. Zimmerman: No, sir, I think that they are not. The tabulation does not purport to give extracts from letters at all. The tabulation is based only upon bids, and the purpose of it was simply to show the figures contained in those bids. It was a tabulation of those figures. I see no reason to check or refer to anything else except the bids. Now they go beyond that into other matter which has not been marked for identification, and concerning which there has been no foundation laid at all.

Mr. Wooden: These other matters do relate to the bids. It is an effort on the part of one of the bidders to change his bid, as I understand it.

Mr. Leisure: That is the point of my whole objection.

1427 By Mr. Wooden:

Q. Do you know how far you have gotten?

A. No. Exhibit 154-D is a photostatic copy of a letter, the original of which appears in the supporting data.

Q. Supporting data attached to what exhibit?

A. 10-A to 10-D. The original appears in the supporting data, by Pennsylvania-Dixie Cement Corporation, by R. H. Baker, salesmanager, dated June 26, 1937, addressed to G. T. Lemmon, purchasing agent, Department of Highways, Commonwealth of Virginia, which is a confirmation of the telegram, a copy of which appears as Exhibit

1428 154-C. Do you care to have me read what it says?

Q. No. Just go ahead with your explanation.

A. Exhibit 154-E is a typed copy of a letter, the original of which, or rather a carbon of which in the supporting data referred to by G. T. Lemmon, addressed to Pennsylvania-Dixie Cement Corporation, James Building, Chattanooga, dated June 28th, referring to the letter covered by Exhibit No. 154-C.

Examiner Norwood: They may be received as marked.

(COM. EX. 154-A to 154-E, inclusive, was offered and received in evidence.)

Mr. Leisure: Your Honor, before we start further tes-

timony, to clarify the record, when we withdrew our appearance for the California companies it has been called to my attention that I did not include the name of the California-Portland Cement Company. That should have been included also as one of the names.

Examiner Norwood: Let the record so show.

1429 Q. Mr. White, what are the papers that I hand you marked Commission's Exhibits 155-A to 155-E, inclusive, for identification? (Handing documents to the witness.)

A. Photostatic copies of the bid prices of Lawrence-Portland Cement Company to the Department of Highways of Virginia, dated June 23, 1937, which appears to be made out upon the invitation form submitted by the Highway Commission.

Q. Where did that particular paper come from?

A. The original was contained in the supporting data which has been referred to.

Q. That accompanied exhibits 10-A to 10-D?

A. That is right.

1431 Mr. Zimmerman: Let me just ask Mr. White if he has any firsthand knowledge at all of the document which has been marked for identification as Commission's Exhibits 155-A to 155-E.

The Witness: I have this knowledge, that those were among the papers which were tendered to us for examination.

Mr. Zimmerman: By whom?

The Witness: Prior to Mr. Lemmon's appearance upon the stand.

Mr. Zimmerman: Where did you get them?

The Witness: They were handed to us.

Mr. Zimmerman: Where did you personally get them?

The Witness: I first got them from Mr. Lemmon.

Examiner Norwood: Do you swear that they were some of the papers that were brought here by the Virginia purchasing agent?

The Witness: I think I would be entitled to do that. I got them from no other source that I am aware of.

Mr. Wooden: He has already said so.

1432 Mr. Zimmerman: May I ask whether there were any other papers that were handed to you by Mr. Lemmon?

The Witness: No.

Mr. Zimmerman: That is all you got?

The Witness: That is all I got, exactly.

Examiner Norwood: Have you tendered those in evidence? Have you offered them in evidence?

Mr. Wooden: Yes, your Honor.

Examiner Norwood: They may be received as Commission's Exhibits 155-A to 155-E, inclusive.

(COM. EX. 155-A to 155-E, inclusive, was offered and received in evidence.)

By Mr. Wooden:

Q. Now, Mr. White, referring to this exhibit 10-A to 10-D, the tabulation for the 1937 bidding on the Virginia highway requirements, have you checked that exhibit so that you can say in how many instances the bids at particular points differed from the others, and in how many cases they were the same?

A. I have.

Q. Will you state what you found?

A. The total of 1,990 bids made by the several companies at a considerable number of destinations, I have not counted the destinations, but all bidders did not
1433 quote for all destinations. To the extent they did quote the bids were alike except in 14 instances.

Q. Out of how many?

A. 1,990. In other words, 1,976 were alike, or 99.3 per cent were identical.

Q. Will you give us the details on the 14 instances where they varied?

A. In the case of Martinsville, Giant, Hercules, Lawrence, Lone Star, Standard, Universal and Vulcanite quoted $2.43 per barrel and all others $2.42. In other words, 7 were alike at that particular destination.

In the case of Elma the Lone Star Company quoted $2.35 per barrel and all others $2.40.

In the case of Gate City, Medusa, North American and Universal quoted $2.12 per barrel and all others quoted $2.32.

In the case of Manassas, Penn-Dixie and Volunteer quoted $2.36 and all others quoted $2.20. The Penn-Dixie quotation in this case is as already appears in the record.

At Harrisonburg, Universal Atlas quoted $2.40 per barrel and all others quoted $2.39.

In the case of 8 destinations the Volunteer—

Q. (Interrupting) Eight destinations you say?

A. Eight destinations.

Q. Will you name them?

1434 A. Alexandria, Rosslyn, Vienna, Fairfax, Leesburg, Brooke, Arcandale and Aquia, the Volunteer Company quoted different prices while at those same destinations all others, to the extent they did quote, quoted identical prices.

Mr. Wooden: Nothing further.

1435 *Cross-Examination by Mr. Leisure.*

Q. Mr. White, on your tabulation there, approximately how many destinations are there? Did you look at that?

A. I had not counted those.

Q. There would be about 150, is that right?

A. I would think approximately that, yes.

Examiner Norwood: In counting those bids, did you base it on all of those destinations; for instance, where one mill bid for all destinations, you counted the same number of bids as there were destinations.

The Witness: That went into the total, of course. As I said, not all of the producers quoted for all of the destinations. I thought I made that clear, but to the extent they did bid, they quoted as I have said.

By Mr. Leisure:

Q. Not taking any one destination, but taking all of them, there were 30 or 40, were there not, that were not identical? Didn't your observation of the tabulation show that?

A. (No answer.)

Q. If you don't know, I won't take your time on it, because the document will speak for itself, but I was trying to sum it up for his Honor as much as I could.

A. I had not made that computation.

Mr. Leisure: That is all.

1436 HERBERT H. RICE, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am at present an attorney in the Corps of Engineers, War Department, and have been there about 8 years. The general nature and scope of my duties there was that we have all problems relating to contract matters, both construction and supplies, and purchase of materials and performance of work for river and harbor projects. The nature of my duties in particular with regard to those matters is that we rule on any questions as to the procedure in the office. Some supplies are purchased in the field, but any questions that arise are referred to us
1437 for decision. Purchases of certain classes of materials are handled entirely by our field officers until they have some question as to procedure that they are not competent to rule on or do not feel they want to rule on. There are different angles concerning which they want advice, such as if they do not feel if they are getting proper bids or if they feel the specifications may not be written properly. The quantity or value of the purchases has something to do with it in some cases and in others it is unlimited. My duties have comprehended the handling of bids on cement in quite a few problems that have arisen in the office since 1933. We were handling cement materials prior to 1933, but instances in which the questions were submitted to the Chief Engineers were very rare. Cement is one of the commodities that our field agents are authorized to buy, subject, of course, to compliance with existing statutes as to competitive bids and one thing and an-
1438 other. The increase in the handling of such matters by our office began in about 1933 about the time of the N.R.A. Since 1933 we have made the final decision in the awarding of bids for cement in the engineers department. The papers containing the data and record of the bid pass across my desk. Our office is set up so that we have an officer of the Corps of Engineers in charge. I do not make the decision. We review the bids in order to determine to whom the award should be made. In the event

that these cement bids are tied, there are certain regulations that we are governed by in proceeding with tied bids and the bids in the abstract and the conditions that are attached to the bids are examined in our office to determine if there is a lowest responsible bidder.

1439 The witness identified Com. Ex. 156 as an abstract of bids received October 1, 1937 by the District Engineer at Vicksburg, Mississippi. Com. Ex. 157 is the same thing, being the correct abstract. They have made certain changes there. Com. Ex. 156 is improperly marked as to the award. Com. Ex. 156 is the abstract of bids as it came "into us" with a proposed award marked on it to Volunteer, which the Chief Engineers overruled, and Com. Ex. 157 is the correct abstract with a correct notation on it.

Mr. Wooden: I will offer both of those for the record now.

Mr. Leisure: This brings up the question again of abstracts being offered in evidence, and I want to cooperate with the government in every way I can as far as saving time and expense and trouble on their part—

1440 Mr. Wooden: (Interposing.) Pardon me. I should have said in making the offer that the bids from which the abstracts were made are here for your examination.

Mr. Leisure: And the invitations?

The Witness: The invitation is a part of the bid as we have them. They are all clipped together.

Mr. Leisure: Then subject to our checking them with the originals, we have no objection to these abstracts.

Mr. Wooden: These are the original bids (handing papers to Mr. Leisure).

(COM. EX. 156 and 157 were offered and received in evidence.)

By Mr. Wooden:

Q. Can you state, Mr. Rice, whether or not you asked for bids f. o. b. shipping point in that case?

A. We asked for them both ways, f. o. b. shipping point and f. o. b. destination.

Q. Did you get bids f. o. b. shipping point?

A. No, we received bids with a clause permitting us to determine what an f. o. b. destination point would be, but they were all f. o. b. shipping point bids with this clause on them.

Q. You did not have any destination point bids in
1441 this bidding at all?

A. Wait a minute,—perhaps I misunderstood you.

Q. Your specifications or invitations will determine as to what you asked for.

A. We asked for them both ways. In this case we received the usual bid. I think we have a file over there on the table on this particular case where the question was protested to the Comptroller General. These bids were all quoting an identical price and had a paragraph to the usual effect that if the government wanted to determine the mill price, they could do so by deducting the lowest available rate whether it was land grant, special or commercial, and that is the way these bids were received.

Q. And when you said identical price did you mean identical delivered or identical mill price?

A. Identical delivered.

Q. How many bidders were there in that particular transaction?

A. Fourteen.

Q. Will you name them?

A. Hermitage Portland Cement Company, Signal Mountain Cement Company, Georgia Cement & Products Company, Pennsylvania Dixie Cement Corporation, Volunteer Portland Cement Company, Trinity Portland Cement Company, Lehigh Portland Cement Company, National Cement Company, Universal Atlas Cement Company,
1442 Lone Star Cement Corporation, Alpha Portland Cement Company, and the Consolidated Cement Corporation.

Q. What was the delivered price that was made by all the bidders?

A. The delivered price here was—the net delivered price is $50,175 f. o. b. cars at Greenville, Mississippi.

Q. Was that on some particular lot or upon the entire quantity?

A. Without the benefit of an invitation, I am afraid I cannot answer some of the questions, because they are set up here as lots 1-A and 1-B.

Q. The tender on lot 1-B, is that the figure you have just given?

A. Lot 1-A is of course marine delivery at barges, Greenville. There was only one bid received at that point on that basis.

Q. You made some reference to a protest being made for a proposed award in that letting?

A. Yes.

Q. Will you state what the circumstances were?

A. Under the authority that I have referred to a while ago, the District Engineer proposed to make the award in this case to the Volunteer Portland Cement Company. Although all of the bids were identical as to the deliv-
1443 ered price, the Volunteer Portland Cement Company made a stipulation that at no time during the life of the contract would they charge the government any more than they were willing to sell cement in the same locality, and the District Engineer at Vicksburg thought that was an item in favor of the government and proceeded to make the award on that basis, since our regulations provide that in the event of tie bids, award can be made to any one bidder as the interests of the government may appear. When the matter was referred to the Chief Engineer, his proposed action was overruled and the award was made to the Consolidated Cement Corporation, as I remember. I would have to check that from the file. May I have that paper of—the paper I brought with me?

Q. Can you state on what basis it was determined that the award be made to them?

A. The award was made to that company so that we might follow out the provisions of the advertisement for bids as far as possible in view of the prices we had received and the conditions that were attached to them.

Q. What provisions do you refer to that you wanted to make effective?

A. Paragraph 6 of the advertisement for bids provided that the award would be made on the basis of the lowest delivered cost to the government, and that in the event a bidder failed to quote a price f. o. b. mill, the govern-
1444 ment should have the right to determine the f. o. b. mill price by deducting from the f. o. b. destination price the cost of transportation at commercial freight rate, and to make award at the bidder's price f. o. b. mill so determined. Now, in this particular case we determined that the Consolidated Cement Corporation mill was farthest from the delivered point, and involved the highest transportation cost, so we carried out the intent of this paragraph as far as we could and we proceeded to ascertain if by awarding it to this company, it would not result

in the lowest price paid directly to the mill. We found that was so and we made the award on that basis.

Mr. Leisure: Does the record show, Mr. Wooden, what that paragraph is that he refers to?

The Witness: You have it in the specifications in those bids. It is paragraph 6 of the bids.

By Mr. Wooden:

Q. What was the further history of the matter?

A. Well, the Volunteer Portland Cement Company sent a telegram to the Comptroller General dated October 21, 1937. Do you want the contents of the telegram? It is quite a lengthy affair. They just simply protested the action in overruling the District Engineer.

Q. Just a running description of what happened.

A. The Comptroller General addressed a letter
1445 to the Secretary of War for a report and we replied to the Comptroller General's letter.

Q. Do you have your letter to the Comptroller General?

A. Yes, sir.

Q. What did you have to do personally with its preparation?

A. It was referred to me for preparation of the letter for the signature of the Secretary of War.

Q. Do you have a copy of it that you could supply for the record?

A. I would have to make a copy. This is an official file here that I brought with me.

Q. Do you have any objection to having that particular document marked here?

A. No, you can mark it for anything you want so that you can identify the photostat. It is cited in the decision.

Q. You say you wrote the letter to the Comptroller General putting the matter up to him for determination. Did you get a ruling on the matter?

A. Yes, we did.

Q. Under what date?

A. Under date of December 8, 1937, by decision of the Comptroller General No. A-89,791.

Q. Does the Comptroller General's letter incorporate or does the decision incorporate the letter which you sent to him on the subject?

1446 A. It has the entire letter there with the exception of a concluding paragraph in which we told him

we were enclosing an abstract of bids and photostatic copies of the proposals of the Volunteer Portland Cement Company and the Consolidated Cement Corporation, and he might retain the same in his files. Aside from those few words, it has the entire letter in the decision.

The witness identified Com. Ex. 158-A to E as an exact copy of the decision of the Comptroller General, in this case, No. A-89,791.

Mr. Wooden: I want to offer that for the record.

Mr. Leisure: No objection.

1447 Q. This opinion of the Comptroller General to which you refer, did that contain some discussion or ruling upon the status of the control clause which has been referred to here, being that which provides that the government shall deduct whichever is the lowest rate, whether land grant or otherwise?

A. I interpret his decision to have the effect of reinstating a previous decision that he rendered in 1935.

Q. During the period between this former decision of 1935 that you refer to and the one of December 8, 1448 1937, what was the practice of the Engineers' Department that you are connected with with regard to that control clause?

A. Well, we were for the most part making awards of contracts on the basis of an f.o.b. delivered price because we were not getting bids f.o.b. mill.

Q. But with regard to the control clause, what were you doing?

A. We were not doing anything about it. It was in there and that was all we could do with it.

Q. You mean you were accepting it and awarding bids on the basis of the control clause?

A. Yes.

Q. Was that true even after the decision of the Comptroller General in March, 1935?

A. It has been my recollection that all awards that we have made for cement have been on the basis of bids which have contained this control clause in them. They have all had it. As far as I remember, I know of no case where they did not have it. The fact that we bought cement would indicate that we had to make it on that basis.

Q. Did you agree with the Comptroller General's opinion that the effect of that clause was to deprive the government of the benefit of the land grant rate?

Mr. Leisure: If your Honor please, I think that is going too far. Whether or not this witness agrees
1449 with the Comptroller General has no binding effect on any of the respondents in this case. It may be interesting to the Examiner, but it certainly is not material to any of the issues in this proceeding.

Examiner Norwood: I think if the Comptroller General's opinion can come in, this witness' opinion can come in.

Mr. Leisure: That is not material to this case.

Mr. Wooden: This is a practical man handling the day-by-day problems of the purchasing department.

Examiner Norwood: I understand he is laying the ground work for their action in awarding these bids. It is not taken as evidence that either one of them is right.

1450 The Witness: Well, any bid which contains the language that is included in the clause which was usually found in those bids, it would be very apparent that the government could not secure the savings through land grant freight rates which it had a right to secure in according with the Land Grant Acts, and our department agreed with the theory that the insertion in bids for cement of any such qualifying clause would have the effect of prohibiting that saving from going to the government.

By Mr. Wooden:

Q. Do I understand that nevertheless during a period of greater or less length—I will let you fix it—that your department did place awards with the clause in the bids, which operated to deprive the government of the benefit of land grant rates?

A. Yes, we placed orders under those bids.

1451 Q. Are you familiar with certain rulings of the Comptroller General in the month of January, 1937, on the subject of the control clause?

A. You say January, 1937?

Q. Yes.

A. I have a copy of the decision which I recently secured. I have not analyzed the decision or anything.

Q. You referred a few moments ago to your understanding of the most recent decision as restoring the decision of March, 1935. What was the necessity for restoring the decision of March, 1935?

1452 A. The Comptroller General's decision No. A-83059 of January 28, 1937 and a similar one, A-83392 of February 5, 1937, would have the effect of reversing his 1935 decision.

Q. And thereby permitting the use of the control clause?

A. Well, either permitting it or at least not finding any great amount of fault with it.

Q. Now, can you tell me during the period between March, 1935 and January, 1937, what the practice of your department or your bureau was with regard to the control clause?

A. Well, I think, without reviewing the files, my own recollection is that we continued to make awards to the lowest bidder when we could find one, which was not very often, and when we did not we then made it on the basis of the bids received. As I said before, these control clauses showed up in the bids, in making the awards.

Q. Why did not you follow the opinion of the Comptroller General of March, 1935?

1453 A. Well, I feel that the department did follow his decision, in so far as it was able. We were charged with carrying—

By Mr. Wooden:

Q. (Interrupting) In so far as it was able?

A. I mean if we could not get bids without qualifying clauses we would have to make awards to get the material on the best basis we can. Since 1935 we bought probably several million bags and barrels of cement. We could not defer public works to get cement bids on any particular basis that the Comptroller might or might not like.

Q. In other words, you had to have the cement. What is the usual method of awarding bids when you have identical delivered prices submitted?

A. Well, the first thing we do is to analyze the bids and se if there is anything in any particular bid that would be beneficial to the Government. If there is not, why, the award is made by lot.

Q. Have awards by lot on cement been rather common or not common during your regime?

A. Award by lot has been the practice in more cases than otherwise. In some cases, back when the depression was pretty strong, why, we made awards on the basis of a canvass of the mills that had had very little Govern-

ment business, in an effort to spread business as far
1454 as possible, if there was no other basis on which to determine it.

Q. Does this recent action in awarding the bid to the most distant mill represent a new policy or is it just sporadic?

A. No. I seem to recall one or two cases where we did it before, quite some time ago.

Q. Do you find in the bidding uniformity or lack of uniformity, in the terms and conditions of the bids, aside from the price figure itself?

A. You mean such as discounts, or something like that?

Q. Yes.

A. My recollection is that they are all uniform, as to any of those features that would reflect in the cost or advantages to the Government, such as refunds for cloth sacks, and things of that sort.

Q. Did you have anything to do, Mr. Rice, with the handling or passing on the bids for the Bonneville Dam cement purchase?

A. Yes, sir, we handled those in the office.

Q. What did you, individually, have to do with those?

A. Well, I think all I would have done with those, as in any other case, we would have reviewed the bids to determine whether there was one particular bidder to whom the award should be made, and make certain recommendations to the chief of engineers.

Q. Can you tell me whether all the purchases of cement for the Bonneville Dam have been completed?

1455 A. At this time?

Q. Yes.

A. Yes, sir, I think everything is purchased.

Q. Can you give us some idea of what the total quantity purchased for the Bonneville Dam was?

A. I am afraid I could not give you that. It is a very large figure.

Q. Would it run as much as a million barrels?

A. Probably over that. I think some of the purchases were around 600,000 barrels at a time. Of course, those deliveries are spread over a considerable period of time.

Q. Can you say when the last purchase was made?

A. I do not think there has been any cement bought for Bonneville for some time, probably a year or more.

Q. Can you say about when the first purchase was made?

A. Probably in 1934. That would be subject to check, however.

Mr. Wooden: Your Honor, at this time, before 1456 proceeding with the next witness, I want to have this Exhibit 158, the Comptroller General's ruling of December 8, 1937, read for the information of those present, including yourself. Whether any portions of it need to go into the record I cannot say. Probably excerpts ought to go in.

Examiner Norwood: You may read extracts of it off the record. It is already in evidence.

(Whereupon Mr. Paulson read excerpts of Commission's Exhibit 158-A to 158-E, the following of which was read into the record:)

"Further, while the bids received in this instance are not as objectionable as the bids considered in decision of March 23, 1935, to the Secretary of the Interior, A-60755, in that those bids quoted only one destination price with a provision to the effect that if shipment be made on a Government bill of lading there could be deduced from said destination price the cost to the Government of effecting such shipment, whereas in the present case two separate prices are quoted, to wit, a destination price and a lower price to be used in determining the point of shipment price if shipment is to be made on Government bill of lading, still these bids do not as requested in the invitation quote a bona fide f.o.b. bidder's shipping point price. 1457 Hence bids submitted on the basis of the bids here in question are objectionable in that they may result in depriving the Government of the full benefit of the land-grant or equalization-agreement rates applicable to shipments on Government bills of lading. That is to say, if the difference between the two prices quoted by a bidder under bids in the form of those here in question is less than the difference between the amount of the commercial freight and the amount of the freight at the rate applicable to the Government on the shipment involved, the Government would not receive the full benefit which it should receive as a result of buying f.o.b. shipping point and making the shipment on Government bill of lading.

However, it is appreciated that in this instance—as in

the cases considered in A-83059, dated January 28, 1937, and A-83392, dated February 5, 1937,—where the United States requires delivery of the cement, the contracting agencies may have no choice but to accept the lowest or most advantageous bid received after proper advertising. But since the enforcement of the anti-trust laws and the laws against unfair methods of competition is committed to the Department of Justice and to the Federal Trade Commission, respectively, the contracting agencies concerned should call to the attention of said Department and Commission each instance of what appears to be
1458 collusive bidding."

EVERETTE MAC INTYRE was recalled as a witness on behalf of the Commission, having been previously duly sworn, testified further as follows:

Direct Examination (Continued).

The witness identified Com. Ex. 159-I to Com. Ex.
1459 159-18 as photostats furnished to him by Mr. George H. Reiter, General Manager of the Cement Institute, on June 22, 1934. He does not have the paper marked Com. Ex. 159-19; Com. Ex. 159-20 to Com. Ex. 159-60 as a list of photostats furnished to him by Mr. George H. Reiter on the date stated during witness' investigation in Mr. Reiter's office.

Mr. Wooden:

"The one number, 159-19, which was skipped was by inadvertence. Nothing has been taken out from this file."

The witness said he selected certain documents from Mr. Reiter's files in Chicago on June 22, 1934, or a few days previous to that, and on June 22, 1934, Mr. Reiter furnished him with photostats of the documents which witness had selected from the files. Mr. Reiter did not furnish him the papers he had selected and these are the photostats which Mr. Reiter furnished him. All of those
1460 papers carry identifying marks in witness' own handwriting which were placed on them at the time. Those marks are witness' initials and certain symbols he

placed thereon so that he could determine from what man and at what time he secured them.

1460 Mr. Wooden: I will offer the entire collection at this time, your Honor, as Commission's Exhibit 159 1-60 inclusive.

Mr. Leisure: As to these papers, your Honor, without taking the time of your Honor in reading these as to their materiality, we will not make any objection, but assume if we find paper when we read them, which is not material to the issues, your Honor will entertain a motion to strike it from the record.

Examiner Norwood: Certainly.

Mr. Leisure: But as to competency, we raise no objection.

Examiner Norwood: Received as marked.

(COM. EX. 159 1-60 was offered and received in evidence.)

Mr. Wooden: Now, your Honor, these papers in general relate entirely to the bidding on the Bonneville Dam project along in March and April, 1934. That was during the code period, of course, and some of these communica-

1461 tions comprising this exhibit are of such a character that I think they ought to be read into the record and possibly others read for the information of the Examiner.

Examiner Norwood: Make the extracts short for the record so that we may be able to find that information when we study them. I think that is very helpful.

Mr. Wooden: The first paper is 159-1 and is a telegram from James A. Keller, vice president of the Pacific Portland Cement Company to B. H. Rader, chairman of the Code Authority, dated March 17, 1934, as follows:

"Referring phone message date with you and your assistant pertaining application land grant rates stop Southern California mills insisted on making prices where land grant rates involved stop basis to use was list price at destination less commercial freight rate stop on large order at Nogales opened early part of February cement manufacturers bid on this formula and developed that through application of land grant rates it made Calaveras mill approximately two cents barrel low and they secured business stop it was then decided the only way to quote government projects where land grant or other special rates were used which were lower than published rates as contained in railroad company tariffs the following formula should be used

stop takes destination price deduct from all interested
1462 mills their commercial freight rate then add for comparative purposes their land grant or special rate applicable which will give cost to government at destination from various mills and the highest rated mill if they were interested would have to deduct from their mill price the difference to equalize with the lowest rated mill and this has worked out in satisfactory manner to interested parties for the reason that the prices so arrived at at the various mills plus rate government would pay would make same total price at destination stop the government is calling for bids at Bonneville Oregon opening March twenty third and this formula was suggested to Oregon mills at conference at San Francisco Friday but they claim in their opinion proper method to use would be destination price less the commercial or land grant rate as the case might be with freights equalized with the lowest rated mill stop will you please wire us first thing Monday morning so that we can notify interested parties how we all shall figure Bonneville bid based back to a mill price which in all cases in our opinion the mill price must be the difference to equalize with the lowest rated mill stop also appreciate if ascertain and wire what mill price Calaveras and Monolith are going to use stop your letter March thirteenth indi-
1463 cates prices operative March seventeenth at various northern California points upon receipt this letter from you yesterday March sixteenth Santa Cruz and Calaveras discounted same by telephoning these prices to the trade believe this practice violation of code as none of our customers received their notification until Saturday morning mail."

Exhibit 159 3 and 4 is a telegram to B. H. Rader from the Beaver Portland Cement Company and the Oregon Portland Cement Company dated March 17, 1934:

"Bids on three hundred thousand barrels in bulk for Bonneville Dam are invited for March twenty three stop only price now filed is two fifty six dollars fob cars Bonneville less ten cents cash stop question arises as to application of land grant rates which as usual can not be definitely determined by range in carying amounts under commercial all rail rates of from four cents per barrel from Oswego nearest mill to job to approximately fifty nine cents under par barrel from Monolith farthest mill stop your general letter of March second advises that in computing destina-

tion cost to government where it is desired to arrive at mill base price so that shipment may be made on government bill of lading land grant rates shall be deducted from destination price to mill and not commercial freight rates

stop competition with Oregon companies by Califor-
1464 nia companies is by rail and water shipments all rail

commercial freight rates on file are so high as to be prohibitive but the contention is now made that deduction of all rail commercial rates should be made from destination price to arrive at mill price for mill delivery to government for shipment on government bill of lading stop this seems contrary to the spirit if not the letter of the code and makes possible as many prices to the government as there are mills bidding with distinct advantage to mill most remote from job stop an immediate ruling by the code authority to all California Oregon and Washington mills which will provide a method of bidding equitable to all will be greatly appreciated otherwise we fear many violations of the code will be apparent when bids are opened on the twenty third stop so vital is this matter to manufacturers of the whole Pacific Coast that no expense should be spared to straighten it out prior to bidding stop we would suggest that Lucas who is familiar with all circumstances and interested only in the well being of our industry of the coast be instructed by code authority to intervene with authority to make rulings which will be binding on all bidders."

Exhibit 159 6 is a telegram from James A. Keller
1465 of the Pacific Portland Cement Company to B. H.

Rader chairman of the Code Committee, dated March 19, 1934, as follows:

"Answering your telegram sent four-thirty eight PM date please wire northern California Monolith and Oregon mills our price on Bonneville business bids opening custom house Portland Oregon three PM March twenty third will be one dollar sixty cents per barrel fob cars Redwood Harbor buik less ten cents per barrel cash discount fifteen days with land grant rates equalized with Monolith Davenport Kentucky House Merced and Bay Point."

Exhibit 159 11 is a telegram by the Chairman of the Code Authority, B. H. Rader, to the officers who are named of the following companies, Monolith, Santa Cruz, Cowell, Oregon, Yosemite, Calaveras, Beaver, and California.

"Price received for filing today one six naught bulk fob

cars Redwood Harbor subject to ten cent cash discount and state applicable to Bonneville bids March twonty third also stated that land grant rates will be equalized with Monolith Davenport Kentucky House Merced and Bay Point stop However in our acknowledgment of filing we have called attention to the fact that this price is operative only on March twenty fifth according to code."

1466 Exhibit 159 14 is a telegram from E. P. Lucas to B. H. Rader, dated March 22, 1934:

"Going to Portland tonite Multnomah Hotel stop have talked to half men on coast relative Bonneville bid and land grant rate question and I can't see how any member can bid one fraction cent lower than the filed price of two fifty six bulk fob car Bonneville and not violate code stop most of members claim under formula submitted by you they can take mill base price and this gives a price of two fifty three plus which if used is a violation according to my interpretation stop in other words I claim no bid can be less than the filed price in effect today stop wire me via Western Union quick am I right."

The answering telegram of March 22, Exhibit No. 159 15:

"Retel only price filed at this time for Bonneville equivalent to two fifty six bulk stop understand Bonneville letting twenty third therefore too late to file new prices effective that date so price now filed must be used stop destination cost to government must be filed with code authority like all other prices."

Exhibit 159 24 is a telegram from Santa Cruz Portland Cement Company to B. H. Rader chairman of the Code Authority dated March 26, 1934 as follows:

1467 "Under date of March nineteenth you wired J. A. Keller San Francisco advising formula to follow in arriving at destination price based on land grant rates for shipment of cement from various mills to Bonneville Oregon this wire was distributed to all interested bidders in California and Oregon for their information stop railroad company advised all interested parties land grant rates which would apply stop study developed that by using basing price at mill nearest to destination Oswego was low with mill base of two dollars twenty cents plus land grant rate of three three naught seven two nine six making delivered price two five three naught seven two nine six stop all railroad company advise that rate applicable from Kentucky House shipping point of Calaveras was seven two

two six three four four which would have made their mill price one eight naught eight naught nine five two they bid one six five three three eight making their bid approximately fifteen cents per barrel less than other bidders stop inasmuch as each bidder was required to make affidavit that its bid was in accordance with terms of code for cement industry should not Calaveras bid be disregarded."

Exhibit 159 31 is a telegram from G. H. Reiter secretary of the Code Authority to L. C. Newlands, vice president Oregon Portland Cement Company as dated March
1468 30, 1934, as follows:

"Retel only prices mentioned in your wire filed and effective on or before March twenty third date Bonneville letting are fob cars in bulk Bonneville two fifty six and fob cars Oswego in bulk two twenty per barrel stated as basing price only stop therefore our opinion under article nine of cement code other prices mentioned your wire are in violation."

Exhibit 159 32 is a telegram from Arthur B. Shelby vice president of the Calaveras Cement Company to B. H. Rader, chairman of the Code Authority dated March 31, 1934, as follows:

"Your telegram to government district engineer here advising our bid illegal account failure to give five day notice I think erroneous see your telegrams March seventeenth and nineteenth to Jas A Keller in which you outline formula for government bids and definitely state to ignore destination price stop as price at Oswego has been on file with you some time and as we have privilege of meeting competitors figures provided they have been on file at least five days how do you figure we are violating code when we based our bid on Oswego and carried out instructions contained in your telegrams to Keller please reconsider and wire engineer here to cancel your previous sugges-
1469 tions so award can be made answer at San Francisco."

Exhibit 159 39, 40 and 41 is a letter from James A. Keller, vice president, Pacific Portland Cement Company to B. H. Rader, chairman of the Code Authority dated April 3, 1934, as follows:

"Referring to phone conversation March 17th, and also your telegrams of March 17th and 19th, which relate to formula to use in figuring prices and freight rates on the

Bonneville Dam. These telegrams were distributed to various interested cement companies in California and Oregon.

"On March 13th, 1934, the U. S. Engineers Office at Portland, Oregon, sent out invitation for bids, No. 34-543, sealed proposals to be opened March 23rd at Portland, for 300,000 barrels of Portland cement. Page (d) paragraph 1 of the invitation reads: 'Bidders must state in their bids for delivery fo.ob. cars at mill, the point or points at which they propose to make deliveries. The amount of savings to the United States by making shipments on government Bs/L will be considered in canvassing bids.'

"Page 9 of Standard Form 31, attached to the bid, states, 'A bidder has the privilege of bidding on one or more of the lots under each schedule of which four follow, viz:

1470 'Schedule A, bid for deliveries f. o. b. railroad cars at mill shipping points.

'Schedule B, alternate bid for deliveries, f. o. b. railroad cars at Bonneville, Ore.

'Schedule C, alternate bid for deliveries, f. o. b. barges at Bonneville, Ore.

'Schedule D, alternate bid for deliveries, f. o. b. trucks at Bonneville, Ore.'

"Your telegram of March 19th, 1934 reads as follows:

" 'Government inquiry form permits quoting mill price therefore formula wired Saturday will work perfectly simply quote your mill price using land grant rates instead commercial rates in figuring and ignore destination price.'

"On the basis of the telegram and formula it developed that Oswego was low, as follows:

"Oswego mill base, in bulk	$2.20
Land grant rate	.3307296
"Estimated total cost to the government delivered at Bonneville less 10¢ cash discount, 15 days	$2.5307296

"To arrive at the mill prices at the other mills, from the Oswego price were deducted the following land grant rates:

1471	"Cowell	.7451568
	"Kentucky House	.7226344
	"Merced	.7957664
	"Redwood Harbor	.7441416
	"Davenport	.8063696
	"Gold Hill	.4888
	"Monolith	1.2344080

which left mill prices to be bid, as follows:

"Cowell	$1.7855728
"Kentucky House	1.8080952
"Merced	1.7349632
"Redwood Harbor	1.7865880
"Davenport	1.72436
"Oswego	2.20
"Gold Hill	2.0419296
"Monolith	1.2963216

"The Union Pacific equalized the commercial rates from Lime, Ore. with Gold Hill, so the Lime, Ore. price was the same as Gold Hill, namely $2.0419296.

"The following is the result of the bids submitted to the U. S. Engineers Office on March 23, 1934:

Name	F. O. B Mill		F. O. B. Bonneville
Oregon Portland Cement Co.	$2.0419296	Lime, Ore.	$2.56
Oregon Portland Cement Co.	2.20	Oswego, Ore.	2.56
1472 Beaver Portland Cement Co.	$2.0419296	Gold Hill	2.56
Pacific Portland Cement Co.	1.786588	Redwood Harbor	
Santa Cruz Portland Cement Co.	1.72436	Davenport	
Monolith Portland Cement Co.	1.2963216	Monolith	2.56
Henry Cowell Lime Co.	1.7855728	Cowell	
Calaveras Cement Co.	1.65338	Kentucky House	2.5307296

"Cash discount 10¢ per barrel, 15 days.

"All the mill prices indicated, plus the land grant rates as heretofore mentioned, would make net price to the government of $2.5307296, per barrel, in bulk, less 10¢ cash discount, with the exception of Calaveras bid, who undoubtedly used some other basis, and their mill price is approximately 15¢ per barrel less than what it should be.

"In connection with this matter, we are enclosing you a copy of letter written by the Assistant to the Vice President of the Southern Pacific Company, dated San Francisco, March 21, 1934, and if you will refer to the second page, you will find the various rates quoted which were furnished the Traffic Managers of the various cement
1473 companies, including the Calaveras Cement Company.

"It seems the railroads try to collect charges from the government on the basis of the lines via Klamath Falls, Ore., and the Government takes the position they are entitled to the land grant rate basis via the original track and short line mileage via Ashland, Ore., and government claimed rates were used in the tabulations as indicated in the lower portion of the second page of the letter. However, Washington advised the Engineers Office at Portland the actual government figures are those we have inserted on the second page of the letter.

"Therefore, from a review of the attached letter from the carrier where they contend the rates should apply via Klamath Falls gateway, but the government when paying charges settle same on the short line mileage via Ashland, and it will be noted regardless of what the carrier thinks the rate should be and what they believe the government uses in making settlement the rates furnished by Washington to the Engineers Office are lower than either basis, and under these circumstances you can see how difficult it is for the traffic managers to compute the proper charges, when in the first instance the government will not furnish same and we have to be governed
1474 entirely by the railroads' quotations of land grant rates.

"Interpretation No. 16, dated Dec. 23, 1933, reads as follows:

'We have been asked several times to rule whether under the Cement Code the United States Government may be quoted with the use of land grant rates.

'Our interpretation of the intent of the Code in this

matter is that United States Government may be quoted with the use of land grant rates, in exact accordance with the prevailing practice prior to the adoption of the Code.'

"In making prices to the government prior to the adoption of the Code, the prices where land grant rates were used were mill prices, with land grant rates equalized with the nearest mill to the job, and we believe this is what you intended to convey in your telegram of March 19th, 1934. We cannot understand how we can quote a delivered price to the Government on the basis of the land grant rates which we have no control over and they only apply when we quote the government an f. o. b. mill price and they furnish a government bill of lading."

1475 Exhibit 159-42 is a memorandum marked "Personal, Mr. Rader. Private; as a matter information. Understand Santa Cruz protest to code authority." Dated April 3, 1934, analyzing the bids as made, and concluding with this paragraph:

"We would infer from the telegram sent out by your office March 29th, 1934 that none of the bids filed are in compliance with the Code, and if the Government agencies have been so advised they undoubtedly will have to readvertise, and we hope prior to the time they are readvertised a formula can be worked out which is satisfactory to all interested parties in the territory west of the Rocky Mountains, not only for Bonneville but also for Coulee and for other departments of the Federal Government who call for bids from time to time in this territory, such as the Reclamation Bureau, Forestry Service, Army and Navy Departments, etc."

Exhibit 159-45, a telegram from Monolith Company to Mr. Rader, dated April 3, 1934.

"Believe two mills bid irregular prices f. o. b. Portland and f. o. b. Bonneville under schedule B on recent Bonneville letting if so would that make entire bid irregular assuming bid under schedule A was regular it being our understanding that schedule A will be used in determining successful bidder Stop We contend a bid f. o. b. any mill for Bonneville arrived at in accordance your telegrams March Seventeenth and Nineteenth to Keller of Pa-
1476 cific Portland would be in accordance with code also your general letter of March Second and interpretation Sixteen Stop Paragraph B your general letter

March Twenty Ninth quotes Article Nine Section Two therefore it would seem that you would consider such a bid as a price change although this is not the intention Stop Could a mill bidding at mill as explained accept an award without having filed on any of Bonneville cement bids wire answer collect."

Exhibit 159-55 is a telegram from Mr. Rader to Barton Murray, Deputy Administrator, N. R. A., dated April 10, 1934.

"The only prices on file with the Code Authority applicable to Bonneville letting March Twenty Third are two dollars fifty six cents bulk f. o. b. Bonneville and two dollars twenty cents bulk f. o. b. Oswego Oregon Stop Any bids submitted which do not result in cost to the Government identical with the aforesaid prices taking into account the lowest freight rates available to the Government from Oswego to Bonneville are not competitive and therefore not having been filed with Code Authority are in violation of the Code and should not be considered Stop We have had no opportunity to check bids presented as to compliance with terms and conditions as we have no copies of said bids."

Exhibit 159-57 is a telegram to Mr. Rader from L. C. Newlands, dated April 13, 1934.

"All bids on Bonneville are thrown out to be readvertised."

1477 Exhibit 159-60 is a letter from Elwood Mead, Commissioner of Bureau of Reclamation, to N. C. Reitze, Vice President and General Manager, Superior Portland Cement, Incorporated, Seattle, Washington, dated April 27, 1934.

"By reference of Senator Bone of Washington, I have your letter of April 17, 1934, urging that land grant freight rates be announced in connection with the invitation for bids for cement for the Columbia Basin Grand Coulee Dam in Washington.

"The policy of this Department has always been adverse to furnishing information with respect to land grant rates. In fact, it is understood that this is the policy of all Government departments. In this connection the War Department was contacted regarding proposals for cement for the Bonneville Dam, and has informally advised this Bureau that it has no intention of furnishing land grant rates in connection with its invitation for bids on cement.

"For your information I am enclosing copies of letters addressed to the Bureau, March 30, 1934, and April 3, 1934, by the National Recovery Administration advising, among other things, that the purchase of cement by the Government is in an entirely different class from the purchase of cement by private industry and that in the case of bids for cement for the Government, the bidder must name f. o. b. mill so that Federal bills of lading may be used."

Then the handwriting on the bottom:

1478 "BHR. This doesn't look like we will get any cooperation on land grant rates for use in bidding. EPL 5/2/34."

1479 Washington, D. C.
Thursday, January 6, 1938.

1488 HERBERT H. RICE thereupon resumed the stand as a witness for the Commission and testified further as follows:

Direct Examination (Continued).

The witness identified Com. Ex. 160 A, B and C as a photostatic copy of an abstract of bids received by the District Engineer at Portland, Oregon on March 23, 1934 for furnishing 300,000 barrels of cement. This is a photostate from the file in his office, identified by these marks that are on here "(indicating)" this mark here "(indicating)". He said that he did not know who wrote "Disapproved by Chief Engineer 4-16-34." He does not know just what it is. One of these invitations in Portland was readvertised, or original bids were rejected. That
1489 may be what that means. Without looking it up he is afraid he cannot answer definitely, without having the benefit of another file.

Mr. Wooden: I will offer this for the record. It relates to the letting of the bids which we went into yesterday afternoon through exhibits from the files of the code authority.

Mr. Leisure: Are the invitations and the bids here, Mr. Witness?

Mr. Wooden: I can answer that. They are not here. I will, if you wish, defer offering them until those can be produced.

By Mr. Wooden:

Q. Will they have to be brought from the West Coast?

A. They will have to be brought from Portland. It may be that the photostatic copies of the bids—if that is an abstract of bids which were rejected, they would have to be brought from Portland. If an award was made under them we can get copies from the returns office of the General Accounting Office in Washington.

Q. Those were rejected?

A. If they were rejected we would have to get them from Portland.

Mr. Leisure: I do not understand. This tabulation apparently came from some place.

The Witness: Our policy is to return all bids
1490 after decision to the the office opening them, not to keep them in this office.

Mr. Leisure: Just on the tabulation, without seeing what is back of the tabulation, we will have to object to it, Your Honor. I suggest it be marked for identification and as soon as we can see the invitations and the bids we will have no objection.

Mr. Wooden: Well, I would say that even without that the exhibit is competent. It can be gone into, the basis for it, and it can be brought out that the basic data is not here, and all that, but that will merely, as I see, affect the weight of it.

Mr. Leisure: No, I do not think the tabulation is admissible except by consent.

Examiner Norwood: It is not admissible except by agreement.

Mr. Wooden: Off the record.

(Discussion off the record.)

Mr. Wooden: I am content to just merely leave it marked for identification.

Mr. Leisure: To save you any time by asking any questions, I do not have any objection, but I do not think it should go in evidence without any supporting data.

Mr. Wooden: Of course the exhibit that went in
1491 evidence yesterday afternoon from the files of the Code Authority related to this particular letting and gave a lot of figures, and so forth. This is merely the Department's tabulation of what the exhibits already show, in substance.

The Witness identified Com. Ex. 161 A to L (1492) as a

copy of an invitation issued by the District Engineer at Portland on May 2, 1934, soliciting bids on 300,000 barrels of Portland cement.

1492 Q. Can you say whether or not that was a re-advertisement of the same bidding that was rejected a short time before that?

Mr. Leisure: I object to that question, if the Court please. This witness should not summarize on documentary evidence. If there have been lettings and subsequent lettings, then we should have the documents here. There may be plausible and very good reasons for the subsequent lettings.

Examiner Norwood: He is just asking him what this paper is.

Mr. Wooden: No, I am asking him what he knew.

Examiner Norwood: You asked him if it was a re-advertisement, a second advertisement on the same job. I think you can ask him that. Objection overruled.

The Witness: Answering your question here, I am assuming that this information was by some one in the office of the District Engineer and that "disapproved 4-16-34" means that the bids were rejected, and without checking the files, I would not want to say definitely, but it appears that it is, and the reasons for my conclusion are that

1493 this invitation of which this is an abstract is 34-543. The new one here is 34-660, and we number our invitations serially. The first two figures are of the fiscal year. They are both for the same quantity of material, and I do recall that an invitation for about this quantity of cement was rejected and re-advertised about a month later, so my recollection is that this is the re-advertisement.

Mr. Wooden: I offer this Exhibit 161-A to L.

Mr. Leisure: We have no objection.

(COM. EX. 161-A to L was offered and received in evidence.)

1495 Q. Showing you papers marked Commission's Exhibit 162-A, B, and C for identification will you first state what it is?

A. This is a photostatic copy of an abstract of bids received by the District Engineer at Portland, Oregon on May 17, 1934 in response to the invitation for bids 34-660, which is this invitation here. (Indicating.)

Q. Which is Exhibit 161-A?

A. Yes.

Q. Now, can you answer my previous question as to whether or not you obtained bids on an f. o. b. mill basis?

1496 Q. Let me ask you this question. Are you able to answer the question I asked you before?

1497 A. I am able to only by looking at the abstract. After nearly four years, it would be impossible for me to determine whether or not we got bids one way or the other without reading the abstract.

Mr. Wooden: All right. I will offer this exhibit 162-A, B, and C for identification in evidence, and will state that we have available the bids themselves, that is, photostats of the bids from which the abstract was made.

Mr. Leisure: And the invitation?

Mr. Wooden: The invitation is Exhibit 161.

Mr. Leisure: We have no objection.

(COM. EX. 162-A, B, and C were offered and received in evidence.)

Q. Now, Mr. Rice, can you answer the question whether you got bids f. o. b. mills in that letting?

A. I would say from reading this abstract that we received from one bidder here some proposals on an f. o. b. mill basis. I should like to check his bid, though, before I made a final conclusion on that. All the rest of them are f. o. b. delivered point, Bonneville, Oregon.

Q. Which one was it?

A. Bidder No. 5.

1498 Q. Who presumably gave an f. o. b. mill bid?

A. On his caption here he has, "basis for canvassing bids, 100,000 barrels in three lots, f. o. b. railroad cars at mill shipping point."

Q. What bidder was that?

A. Yosemite Portland Cement Corporation of San Francisco.

Q. Were the others all bid destination price?

A. On this abstract they are all based on f. o. b. Bonneville.

Q. Will you state who the bidders were and what the delivered price was?

A. The bidders as numbered on the abstract here, No. 1 was the Beaver Portland Cement Company.

Q. On a per barrel basis?

A. 2.02. That is 2.02 on all three lots of 100,000.

Bidder No. 2 is the Pacific Portland Cement Company, 2.02.

Bidder No. 4 was the Calaveras Cement Company, 2.02.

Bidder No. 6, Santa Cruz Portland Cement Company, 2.02.

Bidder No. 7, Oregon Portland Cement Company, 2.02.

Bidder No. 8, Monolith Portland Cement Company, 2.02.

Bidder No. 9, Oregon Portland Cement Company, 2.02.

There were some alternate bids received from bidder No. 1 at the rate of 2.02 per barrel.

Bidder No. 3, W. C. Dellbrick & Company.

1499 Q. Do you know who they were?

A. Do I know who they were?

Q. Yes.

A. Apparently they were a distributor selling a foreign cement. Their mill is located at Brevik, Norway. They priced 1.90.

Bidder No. 6, Santa Cruz bid 2.02.

Oregon Portland Cement Company, Bidder No. 7, 2.02.

Monolith, Bidder No. 8, 2.02.

Coming back to the one that apparently is f. o. b. mill, Bidder No. 5, bid a price of 1.2357392 on each of the three items.

Q. Do you know how the award was made on that letting?

A. Not unless it is noted on that abstract there. We usually note that on our file copies somewhere; probably on the last page.

Q. The award was made as shown on sheet 2. Will you see if you can find it?

A. This abstract carries a notation of "tie bids." The Chief Engineer's telegram dated May 22, 1934, authorized awards in lots of 100,000 barrels each to Beaver Portland Cement Company, Oregon Portland Cement Company at their mill at Oswego, and to the Oregon Portland Cement Company from a mill at Lime, Oregon.

Q. It was divided equally, apparently, between the

1500 three mills?

A. There mills and two companies.

Q. Oregon mills?

A. Oregon mills, yes, sir.

Q. Coming back for a moment to this matter of your specifications that contained the figures on the land grant rates for this letting, you said that it was not the general

policy to give that information in the invitations. Can you say why it is not?

A. The Quartermaster General is charged with giving out all information pertaining to government freight rates pertaining to the War Department, and it is against their regulations to disclose any land grant freight rates.

Q. Do you know why?

A. I never could find out exactly why; they just don't do it.

Q. Do you know, Mr. Rice, how the bid that was on an f. o. b. mill basis worked out in terms of a delivered price? Did you ever calculate that or did you ever see it calculated?

A. The bid that is on an f. o. b. mill basis?

Q. There was one that you thought might be on that basis or at least on the face of it, it was. It gave a rather long decimal.

A. That is right. Do you mean how that compares on a final delivered cost to the government?

1501 Q. Yes, with the others.

A. I would say that the almost invariable rule would be that it would result in a lower cost to the government, because there your are only taking the mill price plus the actual land grant that is figured to the farthest decimal point they can work it.

Q. And yet that company did not get the award in that case?

A. Well, there probably was some reason why they did not; I don't know.

Q. As a matter of fact, you are really not sure as to how that particular thing works out.

A. I would have to examine the record before I could determine that.

Q. I do not think the tabulation itself will help you on that; I don't know.

A. I have noticed that some of those abstracts are compiled so that there is quite a good bit of confusion, and sometimes they are very hard to read, especially when they get cold. Without the bids, you cannot follow them.

1502 EVERETTE MAC INTYRE, was recalled as a witness on behalf of the Commission, and having been previously sworn, was examined and testified further as follows:

Direct Examination by Mr. Wooden.

The witness identified Com. Ex. 163-A to R as photostates furnished to him by Mr. George H. Reiter, General Manager of the Cement Institute, on June 22, 1934, during an investigation witness was making in Mr. Reiter's offices in Chicago. The witness asked to be permitted to examine certain files in Mr. Reiter's office, which permission was granted. The witness selected from those files certain papers and asked that he be permitted to bring those back to Washington with him. Mr. Reiter refused to do that but he did furnish him photostats of the
1503 papers thus selected. Those are the photostats of some of the papers.

Mr. Wooden: I offer the exhibits for the record.

Mr. Leisure: Again without taking up the time to read them now, I will move later if we feel that any of them are not material to the issues. With that reservation, we have no objection.

(COM. EX. 163-A to R was offered and received in evidence.)

(Mr. Wooden reads certain of the documents.)

Mr. Wooden: I should like to read for the record Commission's Exhibit 163-D, a telegram from B. H. Rader to E. P. Lucas, President of the Superior Cement Corporation, Seattle, dated May 4, 1934:

"Copy of letter from Commissioner Mead to Reitze just received stop despite this letter can now advise you that government land grant rates from Kentucky House Davenport Cowell Gold Hill Redwood Harbor Monolith Lime and Oswego have been furnished division engineer Pacific Division by Quartermaster General and will be published in specifications now being issued for purchase
1504 cement for Bonneville Dam stop specifications will state that any bidder proposing to ship from any other point of origin will be furnished correct land grant rates upon application to district engineer Portland stop

at his request this information wired Keller and given personally to Newlands today."

Mr. Wooden: I should like to read for the record Commission's Exhibit 163-G, telegram from the Oregon Portland Cement Company, L. C. Newlands, to the office of the Code Authority, dated May 16, 1934:

"Have any lower prices been filed for Bonneville letting May seventeenth than two naught two gross bulk f.o.b. cars and f.o.b. barge Bonneville stop have any f.o.b. mill prices been filed by either Washington Oregon or California manufacturers which with application of government land grant rates which rates are embodied in the specifications copy of which was forwarded your office by the undersigned would produce a lower destination cost than that which is now on file stop assuming that no lower price f.o.b. Bonneville has been filed than two naught two bulk and no lower mill prices have been filed which would produce a lower price at Bonneville than two naught two bulk you may accept a similiar filing from our company as being the destination cost to the United States Government stop it is our understanding of course that
1505 the price now on file of two naught two is the destination cost to the United States Government when shipped on government bill of lading and that the cost to the government at the various mills for invoicing would be determined by the government by deducting from the destination cost the land grant or commercial freight rate whichever happens to be the lower transportation cost stop what is the lowest price on file which might be operative May seventeenth at Newport Oregon stop your early acknowledgment by fast wire will be appreciated."

Mr. Wooden: In reply, Commission's Exhibit 163-I, a telegram, May 16, 1934 to L. C. Newlands, Vice President, Oregon Portland Cement Company from the office of the Code Authority, Chicago:

"Retel now lower destination costs filed for Bonneville letting than two point naught two gross bulk for cars and f.o.b. barge Bonneville Oregon stop no Washington Oregon or California mill prices filed specifically for this letting however Yosemite include in their filing of two point naught two for Bonneville Dam derived plant price of one point two three five seven three nine two using land grant rates as furnished by government in paragraph

fourteen of government invitation which figures two
1506 point naught two bulk Bonneville Oregon stop lowest price filed at Newport Oregon operative may seventeenth is three point naught six gross cloth."

1510 The witness identified Com. Ex. 164-A to Z and Com. Ex. 164-AA to DD as photostats furnished to him by Mr. George H. Reiter, General Manager of the Cement Institute, on June 22, 1934. They are, as in the other case, photostats of material that witness selected from its files.

Mr. Wooden: I offer them for the record.

Mr. Zimmerman: I object to them on the ground that there is no proper foundation laid for them. The mere fact that they are documents that were handed to this witness by Mr. Reiter, or by anybody else, is not a sufficient foundation. There is no showing that they are relevant or material in any way to any issues in this case.

Mr. Leisure: I was just going to ask: As I understand it, in the past Mr. Reiter held two positions. He has been with the company and he has been in the Institute. I want the record to show whether or not these came from the files of the Institute or whether they came from his
1511 private office when he was with the company.

The Witness: They came from his files at the time he was general manager of the Institue, and they were in the Institute office files at that time.

Mr. Leisure: This was the office of the Institute?

The Witness: The office of the Institute, Room 806 Conway Building, West Washington Street, Chicago.

Mr. Leisure: This was 1934. Was that the office of the Institute or was that the office of the Code Authority at that time?

The Witness: It so happens that both of them were the same.

Mr. Leisure: But the fact is, is it not, that it
1512 was also the office of the Code Authority?

The Witness: No, it was not the office of the Code Authority. It so happens that the Chairman of the Code Authority was Mr. B. H. Rader and his office was on the other side of the building, on the same floor. Mr. Reiter, as secretary to Mr. Rader, of course was in this office.

Mr. Leisure: Yes.

The Witness: In this office he was also conducting the

managership of the Cement Institute, which served as an agency for the Code Authority, and it also served as an agency for the entire membership of the Cement Institute as well as the Code Authority.

Mr. Leisure: So can you say now, of your own knowledge, that these are papers that come from the files of the Institute rather than from the files of the Code Authority that was being administered at that time?

The Witness: I would have to rely upon the statement that Mr. Reiter gave me at this time, or made to me at that time, and that was this, that the files into which I was making my examination covered the activities of the Cement Institute as an agency for the Code Authority and for the industry. That is all I know about it, because that is what he told me as a representative of the Institute.

1513 Mr. Leisure: So then, as far as you know of your own knowledge, these may be letters that were kept in the regular course of business as part of the business of the Code Authority, as far as you know?

The Witness: Except what Mr. Reiter told me. My knowledge is the knowledge that was passed to me by Mr. Reiter, to the effect that the files I went into to investigate were the files of the Institute in its capacity as the Code Authority and for the industry, that is, a member of the Institute. Other than that I do not know whose files they were. They purported to be and appear to be the Institute files and Code Authority files—or the Institute as an agency for the Code Authority, I would say that. Other than that I have no knowledge of it, because I did not conduct the business.

Mr. Wooden: Will you let me put in a word here? Exhibit 163-C, which is already in evidence, is a telegram from Mr. B. H. Rader, Chairman of the Code Authority, to James A. Keller in San Francisco, dated May 4, 1934, and at the bottom of that telegram these words appear "Charge to Cement Institute." I might say that we have many other similar instances.

Mr. Zimmerman: May I now put in a word? I want to object to the witnesss' statement that the Institute,

1514 or Mr. Reiter, were acting as the agents for the members of the industry. They certainly were not authorized to act as agents for Marquette Cement Manufacturing Company at any time, and that is not the way to prove

agency. I object to the statements and move that they be stricken from the record as being entirely improper.

Examiner Norwood: The counsel can introduce testimony to disprove that, if he wants to. I see no reason for striking it.

Have you offered that in evidence?

Mr. Wooden: Yes.

Mr. Leisure: Could you reserve your ruling until we finish the recess? We will be ready then.

Examiner Norwood: We will be glad to do that. We will take a ten minutes recess.

(Whereupon a short recess was taken.)

Examiner Norwood: Commission's Exhibits 164-A to 164-DD for identification have been offered. Are there any objections?

Mr. Leisure: Subject to our motion of immateriality. I am not sure that all of these are from the respondents. If they should not appear to be from the respondents I should not think they would be material to the issues. Subject to our motion.

1515 Examiner Norwood: Yes. They may be received as Commission's Exhibits 164-A to DD.

(COM. EX. 164-A to DD, inclusive, was offered and received in evidence.)

Mr. Wooden: Your Honor, I would like to read one of the papers, Exhibit 164-D. This is a telegram from G. H. Reiter, secretary Code Authority, dated May 3, 1934, addressed to officials of the following companies: Northwestern States, South Dakota Cement Plant, Huron Portland Cement Company, Spokane Portland Cement Company, Monolith Portland Midwest Cement Company, Idaho Portland Cement Company, Missouri Portland Cement Company, Ash Grove Lime & Portland Cement Company, The Monarch Cement Company, Lone Star Cement Company Kansas, Ideal Cement Company, Hawkeye Portland Cement Company, Dewey Portland Cement Company, Pennsylvania Dixie Cement Corporation, and Medusa Portland Cement Company. It reads as follows:

"Lowest Government destination cost Wiota Montana filed to date for letting May tenth is three point two six four five gross cloth three naught one four five gross paper two point eight naught five four gross bulk stop A clause filed as condition of above price reads quote

the U. S. Government shall determine its cost FOB
1516 cars our mill located at Blank for invoicing purposes
on shipments moving on Government bills of lading
to Qiota Montana by subtracting from above mentioned
destination cost the land grant rate as determined by the
U. S. Government as being applicable from bidders mill
to Wiota unquote stop Last date for filing this letting
May fifth and this office closes noon that date stop We
will advise you of any lower filing received and operative
for this letting."

That telegram also carries the words in type "Chge to Cement Institute."

Now I would like to call Mr. Rice.

HERBERT H. RICE was recalled as a witness for the Commission and, having been previously duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

The witness identified Com. Ex. 165 as a photostatic
copy of an abstract of bids opened May 10, 1934, by
1517 the Division Engineer, Missouri River Division, at
Kansas City, for furnishing 800,000 barrels of Portland cement to Fort Peck, Montana. He believes that delivery was at the railroad station at Wiota.

Mr. Wooden: I will offer that abstract at this time even though I must say that we do not have the bids on which it is based, but I will call attention to the fact that the telegram I just read ties right into the abstract, and I think the figures will check.

Mr. Leisure: Are you going to make available the bids and invitation, Mr. Wooden?

Mr. Wooden: I will be very glad to.

By Mr. Wooden:

Q. Where would the bids on that be?

A. They would be at Fort Peck. They may be in the division office at Kansas City, but I rather doubt it. I think they would be at Fort Peck.

Mr. Leisure: Let us look at the abstract and if we do not need the bids and invitation we will not put you to the trouble of getting them. If you are not going to use it right now why don't you mark it for identification?

Mr. Wooden: I would prefer to use it, as far as that is concerned. I think you will find that the 1518 figures that I read from the telegram a moment ago correspond and check the figures on this abstract. What is the status of the paper? Is it received?

Examiner Norwood: Did you object?

Mr. Leisure: I think it would be better if you mark it for identification, until we determine whether we need to look at the supporting data.

Examiner Norwood: Well, he promises to make the supporting data available. It would come in on the same ground that a great many of the others did.

Mr. Leisure: If he wants to use the exhibit now I will not object to it.

Examiner Norwood: In any of those tabulations where the Commission fails to make the supporting data available, why, I think they would not be considered in the study of the case.

Mr. Wooden: I am asking the witness now if he will undertake to supply the bids and the invitations on this particular letting?

The Witness: Yes, I will be glad to, if you will furnish me with that number.

(COM. EX. 165 was offered and received in 1519 evidence.)

Q. Now, Mr. Rice, looking at Commission's Exhibit 165, what were the bids for cement in paper bags?

A. I do not know that it shows on here.

Q. I will not ask you that. Just withdraw the question.

Mr. Wooden: I think I have already stated, Your Honor, that the abstract of the bids ties up with the figures given in the telegram that is in the record as Exhibit 164-D. I will not take any longer time on that.

The witness identified Com. Ex. 166 as a photostatic copy of an abstract of the bids received by the Missouri River Division of Kansas City, Missouri, on June 5, 1934, for furnishing 600,000 barrels of Portland cement 1520 for use at Port Peck, to be delivered at Wiota.

Mr. Wooden: I offer that for the record, with the accompanying photographic copies of the original bids from which the abstract was compiled.

Mr. Leisure: The invitation?

Mr. Wooden: I have the invitation here also. I want to put that in as a separate exhibit.

Mr. Zimmerman: You say you have the invitation there?

Mr. Wooden: Yes.

Mr. Zimmerman: And are you going to put it in evidence?

Mr. Wooden: Yes.

Mr. Leisure: No objection.

Examiner Norwood: It may be received, with the supporting data furnished counsel for the respondents.

(COM. EX. 166 was offered and received in evidence.)

The witness identified Com. Ex. 167 A to G 1521 as a copy of an invitation for bids issued by the Missouri River Division of Kansas City, to be opened June 5, 1934, for furnishing 600,000 barrels of Portland cement to be used at Fort Peck, Montana. That is the same letting that he just referred to in the abstract.

Mr. Wooden: I offer the invitation to bid.

Mr. Leisure: No objection.

Mr. Zimmerman: May I look at it?

Mr. Wooden: Yes (handing document to Mr. Zimmerman).

Examiner Norwood: It may be received as marked.

(COM. EX. 167-A to G. inclusive was offered and received in evidence.)

Q. I notice in this invitation to bid, Exhibit 167, that you set forth the land grant rates applicable, or to be used in the bidding on the Fort Peck letting at that particular time.

A. I noticed that too in looking through it.

Mr. Zimmerman: I can not hear you.

The Witness: I just remarked that I noticed the 1522 land grant rates there, in going through the invitation, but I do not know of any reason for its inclusion there.

By Mr. Wooden:

Q. Who prepared the invitation?

A. The Missouri River Division.

Q. I note also from the invitation that it states, "In order that the Government may obtain the benefit of shipment on Government bill of lading quotations are requested on the basis of delivery f. o. b. cars at contractor's plant." Did you get quotations on that basis?

A. I will have to look at the abstract in order to tell.

By Mr. Wooden:

Q. I did not mean to imply that that was the only basis on which you estimated, but as an alternate basis.

A. Well, the way it is marked here—in view of this abstract I would say that we did not.

Q. Who were the bidders and what were the bids on that particular letting?

A. Lehigh Portland Cement Company.

Q. Give the per barrel basis.

A. At the price of $2.7054. The same price is
1523 repeated opposite the following other bidders: Ash Grove Lime & Portland Cement Company, Dewey Portland Cement Company, Huron Portland Cement Company, Pennsylvania-Dixie Cement Corporation, Three Forks Cement Company, Universal Atlas Cement Company, Northwestern States Portland Cement Company, Marquette Cement Manufacturing Company and the Hawkeye Portland Cement Company.

Q. Did you read the Three Forks?

A. Three Forks, yes. That was Bidder No. 6.

Q. And the figures were what?

A. $2.7054 per barrel.

Mr. Wooden: A part of Exhibit 164, that is Exhibit 164-J, Your Honor, is a telegram from B. H. Rader, Chairman of the Code Authority, to officials of the following companies: Alpha Portland Cement Company, Northwestern States Portland Cement Company, South Dakota Cement Plant, Huron Portland Cement Company, Monolith Portland Cement Company, Missouri Portland Cement Company, Dewey Portland Cement Company, Monarch Cement Company, Ash Grove Lime & Portland Cement Company, Lone Star Cement Company Kansas, Ideal Cement Company, Hawkeye Portland Cement Company, Pennsylvania-Dixie Cement Corporation. The telegram reads as follows:

"Lowest Government destination cost Wiota Montana
filed for letting June fifth two point seven naught five
1524 four gross bulk two point nine one four five gross paper three point one six four five gross cloth stop Corresponding prices FOB mill Trident filed less land grant rates published in proposal stop Cash discount terms ten cents per barrel and specified as per code stop All sampling and testing costs to be borne by Government with final acceptance or rejection at mill stop Cement

guaranteed to meet all conditions Government specifications stop Stated prices filed for basis award not less than six hundred thousand barrels."

The words typed at the bottom are: "Charge to Cement Institute."

Mr. Smith: Did I understand the bids themselves would be available on that?

Mr. Wooden: On that particular one they are here now. Off the record.

By Mr. Wooden:

Q. Have all the purchases for the Fort Peck dam been completed?

A. I think they have. There is very little work out there of that character left, if it is not completed, if it has not all been completed. You are speaking of cement?

1525 Q. Oh, yes. Approximately how much have been the total purchases of cement for that Fort Peck dam?

A. I would say it is equal to Bonneville. I believe probably—I would not want to hazard a guess, I can not say definitely, but it is way over a million. It is probably in excess of a million barrels.

Q. There were some large lots, some of the lots were nearly a million?

A. Six hundred thousand or eight hundred thousand. If you want that information I can get it for you very readily.

Q. Well, we can get some idea from the totaling of these various lettings.

1526 The witness identified Com. Ex. 168 A as a copy of an abstract of bids received by the Division Engineer, Missouri River Division, on July 25, 1935, for furnishing 600,000 barrels of Portland cement in bulk and 10,000 barrels in paper bags, for the Fort Peck Dam, delivery at Wiota; Com. Ex. G to Q which is attached to it as a copy of an invitation issued by the Division Engineer, Missouri River Division, numbered 425-36-4, which is the same number the abstract has and formed the basis for these bids that are set forth on the abstract.

Mr. Wooden: I offer those papers for the record and I proffer also but not for the record, the accompanying photostats of the bids.

Mr. Leisure: The invitation will be with the abstract?

Mr. Wooden: Yes.

Mr. Leisure: No objection.

1527 (COM. EX. 168-A to Q inclusive was offered and received in evidence.)

Q. In your invitation which you have just identified, does it contain the data regarding land grant rates that the other or former Fort Peck invitations contained?

A. No, it does not.

Q. Can you say why on this particular letting it did not contain the information as to land grant rates while on the prior ones the invitations did contain them?

A. No, I cannot.

Q. I notice in the invitation to bid it is stated that bids will be submitted only on the basis of delivery f. o. b. bidder's mill or plant. Did you receive bids on that basis?

A. We did not; they are all based on a destination cost basis.

Q. Who were the bidders and what was the destination cost bid per barrel?

A. Bidder No. 1, Universal Atlas Cement Company bidding a price of $2.5054 per barrel for the cement in bulk, which was the same price for the other bidders, the Huron Portland Cement Company and the Three Forks Portland Cement Company. For item No. 2, the cement in paper bags, all prices were identical, $2.7145 per barrel.

1528 Q. How many bidders were there?

A. Three.

Q. On how many barrels?

A. 610,000 altogether.

Q. How many bidders were there on the preceding Fort Peck bids? Here is one of May 10, 1934.

A. There were ten here.

Mr. Zimmerman: Is that the one where the bids were all thrown out?

Mr. Wooden: No.

Mr. Zimmerman: Was there a letting upon it?

Mr. Wooden: I think so. The only one that was thrown out that I ever saw was Bonneville.

Mr. Zimmerman: Thank you.

The Witness: There were seven more bids on this than on the later one.

By Mr. Wooden:

Q. And how many were there on the bidding for the bids opened June 5, 1934, Commission's Exhibit 166?

A. There were ten under that opening.

Q. For what quantity?

A. 600,000 barrels.

Q. Referring to this exhibit 166, I note the language: "Portland cement in trainload lots of 70 cars or more in strict accordance with the specifications." Was ce-
1529 ment purchased for the Fort Peck Dam in trainload lots?

A. Quite often it would depend upon what season of the year they were to effect deliveries. They would want slower deliveries in the winter than in the spring or summer or fall.

Q. Do you know whether or not trainload lots were used in this delivery on the bids opened July 25, 1935?

A. I don't know. They have probably recited a delivery schedule here. They provide here in the specifications in paragraph 2: "Delivery schedule as follows, beginning with February, 1936, and running through October, 1936, monthly delivery shall be 40,000, 40,000, 60,000, 60,000, 80,000, 80,000, 80,000, 80,000.

Q. That is in barrels?

A. Yes; barrels to be delivered during the month.

The witness identified Com. Ex. 169 A as a blueprint copy of an abstract of bids opened by the District Engineer of Fort Peck, Montana, on June 10, 1936 for fur-
1530 nishing 300,000 barrels, 5,000 barrels and 300,000 barrels of Portland cement. The two larger quantities are in bulk, to the District Engineer at Fort Peck, Montana. All shipments for Fort Peck are routed to Wiota, Montana. The "supporting papers" on the abstract are a copy of the invitation 631-36-630, which is the invitation under which the bids that are abstracted on this copy were received.

Mr. Wooden: I offer those for the record and proffer to respondents' counsel the photostatic copies of the original bids from which the abstract was made.

Mr. Leisure: No objection.

(COM. EX. 169-A to M inclusive was offered and received in evidence.)

Q. Did your invitation in this instance carry the details regarding the land grant rates that were applicable?

A. It did not.

1531 Q. I note the invitation says, "Bids will be submitted only on the basis of delivery f. o. b. bidder's mill or plant." Did you get bids submitted on that basis?

A. From this abstract, I interpret that we received four bids which were based on a destination cost price, which were not an f. o. b. mill price as required by the invitation.

Examiner Norwood: Did you receive any f. o. b. mill?

The Witness: The first bid quotes a lower price, and without the benefit of the bid itself, there may be some doubt.

By Mr. Wooden:

Q. Which bid was that?

A. No. 1, the Three Forks Portland Cement Company, as near as I am able to figure out here without taking up too much time, the Three Forks Portland Cement Company did submit an f. o. b. mill price.

Q. If it works out there in the tabulation in terms also of a delivered price.

A. Well, we have government freight rate of 85.54 cents which if added to the bid price of 1.95 would make it come out just a fraction of a cent less than the other bids. It would be 2.9054.

Q. All right. What were the other bids per barrel and who were the bidders?

1532 A. The other bids were 2.9385144 per barrel. For the bulk cement, they were Universal Atlas under two bids; they submitted an alternate. The Lehigh Portland Cement Company and the Pennsylvania Dixie Corporation. The smaller item of 5,000 barrels in paper bags, they bid a price of 3.152222.

Q. You have several more bidders in that case than in the bid of July 25, 1935, Exhibit 168?

A. I don't know about more bidders. There were only three firms bidding, but we got four bids.

Q. The Penn Dixie bid this last time, and Huron the time before?

A. That is right.

Q. Otherwise the bidders were the same, is that right?

A. Yes.

1533 The witness identified Com. Ex. 170 A as an abstract of bids received by the District Engineer, Tucumcari, New Mexico, for furnishing 245,000 barrels of Portland cement in bulk and 5,000 in sacks, subject to an increase or decrease of 25 per cent. The bids were opened September 4, 1936. The invitation number is 37-24; Com. Ex. 170 B to L as a copy of invitation No. 37-24 in response

to which the bids that are abstracted on that paper were received.

1534 Mr. Wooden: I offer these in evidence. I have here the photographic copy of the original bids from which the abstract was made, for checking purposes.

Mr. Leisure: No objection, Your Honor.

(COM. EX. 170-A to L inclusive was offered and received in evidence.)

Q. Will you state, Mr. Rice, who the bidders were and what their bids were per barrel, f. o. b. Newkirk, New Mexico?

A. Bids were received from the Ash Grove Lime & Cement Company, Colorado Portland Cement Company—

Q. (Interrupting). Just the ones f. o. b. Newkirk.

A. I will have to withdraw the Ash Grove Company. The first one is the Colorado Portland Cement Company, who bid $2.7938296 per barrel for the bulk and $3.005998 for the sacks. The Monarch Cement Company, the Nebraska Cement Company, the Oklahoma Portland Cement Company all bid the same prices for bulk and sacks. The Southwestern Portland Cement Company bid $2.637 for bulk cement and $2.847 for sacks.

Q. Was that the low bidder?

A. That was low on the f. o. b. Newkirk, yes.

Q. Was it awarded the contract?

1535 A. I do not believe this abstract shows, but my recollection is that it was. There is a recommendation at the bottom there. I do not think there is a notation on there.

Q. There was a recommendation, as shown by the exhibit. Do you have a recollection that it was awarded the bid?

A. It was. The recommendation is there under the signature of the opening office.

Q. Now I will ask you to state who the bidders were and what their bids per barrel were as shown by the abstract under the head of f. o. b. shipping point.

A. Ash Grove Lime & Cement Company bid $2.7938296 for bulk cement, and $3.005998 for sacks. The same prices were received from the Consolidated Cement Company, Lehigh Portland Cement Company, Lone Star Cement Corporation, Trinity Portland Cement Company, Universal Atlas Cement Company, and the Dewey Portland Cement Company.

Q. Now will you tell us whether or not the figures you just read from the abstract on the f. o. b. mill basis were the same figures that the abstract shows for other companies on the f. o. b. Newkirk basis?

A. All prices, whether f. o. b. shipping point or f. o. b. Newkirk, are identical, with the exception of the Southwestern Portland Cement Company which bid on a Newkirk delivered basis.

Q. That is as shown by the abstract?

A. As shown by the abstract.

1536 Q. Now I hand you the original bids from which the abstract was made, and I want to ask you to state whether the abstract is in error in treating any of those bids as f.o.b. mill bids?

Mr. Leisure: Now the witness can not state whether or not the abstract is in error, Your Honor. He can state what the bids show and he can state what the abstract shows, but whether or not it is in error he can not state.

Examiner Norwood: The abstract is in evidence and the bids are not; is that a fact?

Mr. Wooden: That is right, and the bids are the basic material from which the abstract was made.

Examiner Norwood: Yes, but you will have to put in the bids in this case if you want to show the difference.

Mr. Wooden: I have no objection to putting them in at all. I am just following the practice of submitting the bids for checking purposes and treating the abstract as the equivalent, but here is a case where I think I can show that the abstract is in error.

Examiner Norwood: That can be done in the absence of objection. That is the shortest and most direct way of doing it. You can keep these things off the record.

Mr. Leisure: We are willing to admit the abstract 1537 is wrong, Your Honor, if it is wrong.

Mr. Wooden: I want to show wherein it is wrong, and how.

Examiner Norwood: All right, go ahead.

Mr. Zimmerman: That is the reason for having the abstract and the bids here.

Examiner Norwood: Go ahead.

Mr. Wooden: I might say at this point that my purpose in showing this, as it will be in another case that will come up a little later, is that this thing has grown so complicated under the so-called control clause that it confuses everybody.

Mr. Zimmerman: What has the control clause got to do with mistakes made in the abstract?

Mr. Wooden: I will show a little later that it confuses the bidders themselves.

Mr. Leisure: Are you going to show that that can all be avoided by the Government doing as it did in some of the invitations, give the correct land grant rate?

Mr. Wooden: No indeed. It could all be avoided by an unqualified quotation f.o.b. mills.

The Witness (examining documents): I take it that you do not want me to spend a lot of time examining these pages, so I will have to answer on that basis. I do not see any bids here that are actually f.o.b. shipping point
1538 bids. Where they have inserted prices in the f.o.b. shipping point column there appears to have been the usual clause, on a destination basis.

By Mr. Wooden:

Q. You mean the so-called control clause?

A. The control clause. Most of them have put the figure in the f.o.b. shipping point place, but it does not really amount to that sort of a bid.

Q. And, as you have shown, the figures on the abstract, with the exception of the Southwestern, are identical whether placed in the column that is headed "F. O. B. mill" or in the column "F. O. B. Newkirk," is that correct?

A. That is correct, with the exception of the one bid.

Q. With the exception of the Southwestern?

A. Yes. As abstracted they have also failed to put f.o.b. Newkirk bids in those places where they have put f.o.b. shipping point, which would appear to further account for some confusion.

1539 The witness identified Com. Ex. 171 A as an abstract of bids received in response to invitation No. 36-42 by District Engineer at Vicksburg, Mississippi, for furnishing 45,000 barrels of Portland cement. Bids opened September 3, 1935; Com. Ex. 171 B and C as notations accompanying the abstracts; Com. Ex. 171 D to L as the invitation for bids issued.

Mr. Wooden: I offer these documents for the record and tender for checking purposes the original bids on which the abstract was based.

Mr. Zimmerman: Does the witness testify that the abstract is or is not correct? Can we get that without going through all the work of checking?

By Mr. Wooden:

Q. Will you explain, Mr. Rice, just how the abstracts are made up in your division and what use is made of them there?

A. These abstracts of bids are made up by the officer opening the bids at the field point. They are checked in our office as to prices, to see that they are correct, if they are referred to us for decision. We do not take it for granted that the right prices are in the right places with reference to some bidder. We check every price. We know it is correct when we pass on it.

1540 Mr. Zimmerman: If you find it incorrect what do you do about it?

The Witness: Well, we make a correct notation, we correct it in accordance with the bid.

Mr. Zimmerman: Did you do that on this Exhibit 170?

The Witness: Which one is that? Tucumcari?

Mr. Zimmerman: Yes.

The Witness: We did not prepare that abstract or have anything to do with the figures, and if we made the award it was just a case of the figures being in the wrong columns. There was no mixup as to prices or bidders. We disregarded the captions at the top of the columns and made the award to the low bidder. As a matter of fact there is only one bid there to consider.

Mr. Zimmerman: I see.

By Mr. Wooden:

Q. Who were the bidders on this advertisement of 45,000 barrels and what were their bids on the basis of delivery at destination Greenville, Mississippi?

A. The bidders were Universal Atlas Cement Company, $126,900.

Examiner Norwood: Just a moment. Have you offered the exhibit?

Mr. Wooden: I have offered it.

1541 Examiner Norwood: Is there any objection?

Mr. Leisure: No objection.

(COM. EX. 171-A to L was offered and received in evidence.)

The Witness: The bidders were Universal Atlas Cement, $126,900. Hermitage Portland Cement Company the same price. Trinity Portland Cement Company $126,900. Louisville Cement Company, $117,529.65.

By Mr. Wooden:

Q. Is that in the same column?

A. You are speaking about f.o.b. Greenville?

Q. Yes.

A. That is right, the last column. That is the same as this one (indicating).

Q. All right, go ahead.

A. Arkansas Portland Cement Company, $126,900. Monarch Cement Company, $117,529.65. Missouri Portland Cement Company, $126,900. Signal Mountain Portland Cement Company, $126,900. Alpha Portland Cement Company, $126,900. Pennsylvania-Dixie Cement Company, $126,900. Lehigh Portland Cement Company, $126,900. Cumberland Portland Cement Company, $126,900.

1542 Lone Star Cement Corporation, $126,900, and National Cement Company, $126,900.

Q. Now, as I understand it, they were all $126,900 except two?

A. That is right, Louisville Cement Company and Monarch Cement Company.

Q. And that was what?

A. $117,529.65.

Q. Will you look at the original bids for those two companies and see how they bid on that figure $117,000, whatever it was?

A. Just how do you mean your question?

Q. Whether they bid that $117,000 on a destination cost basis or upon a delivered price basis at Greenville.

A. They bid on f.o.b. cars at Greenville, Mississippi.

Q. In other words, the abstract correctly represents their bid as a Greenville delivery price, is that right?

A. That is right.

Q. Now will you look over in the other column and state what the bids were on the Government destination cost basis?

A. For these two companies?

Q. Yes, first for those two companies.

A. Well, they did not bid on that.

Q. Then what was the destination cost bid of the other companies?

1543 A. $117,529.65 was bid by all of the other bidders.

Q. And what the other bidders bid on the destination cost basis was exactly the same, was it not, as what these two companies bid on the delivered price basis at Greenville?

A. That is correct.

Examiner Norwood: That is on the mill price, f.o.b. mill?

Mr. Wooden: There isn't any real f.o.b. mill price involved. It is a delivered price and a destination cost in both cases.

Q. Mr. Rice, will you go through the original bids and give us the bid price on a per barrel basis, which I believe the abstract does not show?

A. Well, the Louisville Cement Company and the Monarch Cement Company bid a price of $2.61177 per barrel.

Mr. Leisure: Your Honor, so much use is being made of these bids, and so that other attorneys may have the opportunity to follow this matter, the attorneys who are not here in the courtroom, I would like to ask that the bids in this case be marked. I do not want to unduly encumber the record, but they are being used here repeatedly.

1544 I think it would be better to have them marked in evidence.

Mr. Wooden: I would be glad to do it.

Examiner Norwood: That is the supporting bids to Exhibit 171?

Mr. Wooden: Yes.

1545 Examiner Norwood: Put this on the record. The paper previously marked for identication as Commission's Exhibit 172 is included in the papers just marked 173-A to O, and there will be no Commission's exhibit 172.

By Mr. Wooden:

Q. Will you tell us what the exhibits marked for identification 173-A to O inclusive are?

A. These are the bids received by the District Engineer at Vicksburg, Mississippi, on September 3, 1935 in response to invitation 36-42, the abstract of which is Exhibit 171-A.

(COM EX. 173-A to O inclusive was offered and received in evidence.)

Q. Now, Mr. Rice, will you tell us what the bid price per barrel was of each bidder, which the abstract did not show?

A. The Louisville Cement Company and the Mon-

1546 arch Cement Company bid the price of $2.61177 per barrel f.o.b. Greenville, Mississippi.

The Universal Atlas Cement Company bid $2.82 on the same basis, Greenville, Mississippi.

Q. What did the Universal Atlas bid on the government destination cost per barrel?

A. They did not bid. They had the usual clause in there with regard to determining that.

Q. All right; proceed.

A. The Marquette Cement Company bid $2.61177 f.o.b. Greenville.

Q. Did they bid on any other basis?

A. I will mention if they bid on any other basis.

The National Cement Company bid $2.61177 and $2.82. The first price is what they call their destination cost price.

The Pennsylvania Dixie Cement Company bid $2.82 f.o.b. Greenville and a destination cost price of $2.61177.

The Arkansas Portland Cement Company bid $2.82 f.o.b. Greenville.

Signal Mountain Portland Cement Company bid $2.82 f.o.b. Greenville, and $2.61177 destination cost.

The Alpha Portland Cement Company bid $2.82 f.o.b. Greenville and $2.61177 destination cost.

Examiner Norwood: Off the record.

1547 (Discussion off the record.)

By Mr. Wooden:

Q. Will you continue?

A. The Lehigh Portland Cement Company bid $2.82 per barrel f. o. b. Greenville, with $2.61177 destination cost.

Lone Star Cement Company bid $2.82 f. o. b. Greenville, and $2.61177 destination cost.

Missouri Portland Cement Company, $2.82 f. o. b. Greenville and $2.61177 destination cost.

Hermitage Portland Cement Company bid $2.82 f. o. b. Greenville and $2.61177 destination cost.

Cumberland Portland Cement Company bid $2.82 f. o. b. Greenville and $2.61177 destination cost.

Trinity Portland Cement Company bid $2.82 f. o. b. Greenville and $2.61177 destination cost.

Q. Will you explain now, Mr. Rice, the difference between the so-called government destination cost and the delivered price at Greenville in this particular case?

A. Well, it is a—

Q. (Interposing.) You have given the difference in figures, but what is the difference in the meaning of the two bases?

A. These destination cost prices are submitted in lieu

of an f. o. b. contractor's mill price, and it is calculated—from the most I have seen—they have taken apparently a somewhat lesser figure than the delivered price based
1548 on commercial freight and stated that "Now, from that figure, you can subtract commercial or land grant or special freight rates, whichever is the lowest available to the government, to determine the contractor's price at the mill." It is not a true f. o. b. mill price, but it is the closest we can get to it.

Q. Do you know, Mr. Rice, how they figure that government destination cost?

A. Are you asking me to answer that question from my own viewpoint?

Q. From your knowledge.

A. I think how it is figured is that the industry has attempted to figure out or estimate land grant rates which would be available from the various shipping points, and they have used that as a basis of determining a figure to quote rather than an f. o. b. mill price.

Examiner Norwood: You mean they have deducted the difference between the land grant and the commercial?

The Witness: They have not deducted the difference, because you can take one of these abstracts and see that that does not follow. They have deducted a figure which in their estimation may be it.

By Mr. Wooden:

Q. In other words, estimated land grant rate?

A. Yes.

1549 Mr. Zimmerman: Do you mind if I see if I can clear that up?

Mr. Wooden: No, I don't mind. We will have a good deal more on this with other witnesses, and I think ultimately we will get it pretty well cleared up.

Mr. Zimmerman: Do you not understand that what the cement companies do is to use land grant rates instead of any commercial freight rate to the point of destination in figuring that destination cost?

The Witness: Are you asking me if I understand that?

Mr. Zimmerman: Yes.

The Witness: No, I do not think they use a land grant figure. They use a figure which they have calculated to be somewhat near it.

Mr. Zimmerman: You think then it is purely an artificial

figure and not the best information they can get as to the land grant rate that would apply?

The Witness: Oh, I would not say whether it was the best information that they could get.

Mr. Wooden: The best information they could get still might be artificial.

Mr. Zimmerman: Yes. There is a lot of artificiality in all figures.

The Witness: The best estimation they could get 1550 would be to give an f. o. b. mill price and let the government figure out what the land grant rate is.

Mr. Zimmerman: I am not undertaking to argue that with you, but I am undertaking to find out what you know, if anything, about what this destination cost price is.

The Witness: I only know this, that in analyzing abstracts of bids these destination cost prices are slightly less than the f. o. b. delivered price. If you take the combination of the land grant freight rates and commercial freight rates to find out what your net government rate is on these various items you will see a slight reflection in the efforts to come close to what the actual land grant rate is.

Mr. Zimmerman: That is what they apparently have attempted to do.

The Witness: That is the only thing that I base my information on from a study of those figures.

Examiner Norwood: Supposing you make the award of the bid on a destination cost basis, then would the mill pay that freight and lay it down?

The Witness: No, sir, they tell us what we can deduct from this first figure. For instance, in the abstract we had here yesterday, they bid something like $50,175 net delivered cost, f. o. b. delivered. Their price was $45,000 1551 on a destination cost basis. From that $45,000, they said that we could deduct commercial or special or land grant rate whichever was the lowest, but when you pay that freight, after you have received your cement, you have paid from government appropriation a total of $45,000.

Mr. Wooden: Some of it to the railroad company and some of it to the cement company?

The Witness: Yes.

Mr. Zimmerman: When you figure that destination price from which you say it appears that they have attempted to approximate the land grant rate, if you deduct then the land grant rate from that, you would have the f. o. b. mill

figure that was used as one of the elements in that destination price.

The Witness: Well, yes, you would have what would be the closest to an f. o. b. mill price that we could come to under that form of bidding. That is what the industry holds it out to be. They say that if you want to determine the bidder's shipping point price, you will deduct this certain freight rate.

Mr. Zimmerman: And you can then discover from that what the f. o. b. mill price would be? If you just went through that little simple arithmetic.

The Witness: You can discover what they have
1552 held out to be the f. o. b. mill price.

Mr. Zimmerman: Just by simple arithmetic.

The Witness: But when you take that government freight rate away from that figure and you take commercial freight away from the delivered price figure, you see there is a span in there.

Mr. Zimmerman: There is a difference?

The Witness: There is a difference which shows that it is not a correct amount.

Mr. Zimmerman: Sometimes in giving you the benefit of a land grant rate, they have given you a lower price than the price given you where they have used a commercial freight rate?

Mr. Wooden: I did not suppose when I allowed you to ask a question, that we would go on so long. You can take that up on cross-examination, if you like.

In this particular connection, your Honor, I would like to read one paragraph from Exhibit 173-O, being a letter of the Trinity Portland Cement Company to the Engineer's Office at Vicksburg, dated August 31, 1935 in submitting these bids:

"You will note the rider attached to item 1 shows the destination cost to the United States Government of $2.061177 per barrel, and as we do not have the land grant
rate applicable from Dallas, Texas to Greenville, Mis-
1553 sissippi, the United States Government shall deter-
mine this cost f. o. b. Dallas, Texas for invoicing purposes of shipments moving on United States Government bills of lading to Greenville, Mississippi as outlined in this rider."

In other words, there is the admission of one of the bid-

ders that it did not have the land grant rate and yet was bidding on a land grant basis.

1554 Mr. Wooden: Your Honor, at this point I wish to offer some papers which will throw further light upon this particular transaction that the witness has been testifying about. The papers I refer to are copies of letters from the files of the International Cement Company at New York. I have had them marked for identification as Commission's Exhibits 174-A to J, inclusive. They have been offered for examination to counsel for the respondents. We would proceed to a formal identification of these papers through a representative of the Commission were he available at this time, and we thought he would be, but he has been called to Philadelphia by the death of a brother. My understanding is that counsel for respondents, having satisfied themselves on the authenticity of the papers in question, now waive further identification of them, or, at any rate, are willing to postpone further identification of them.

Mr. Leisure: Subject to check as to correctness, we do make no objection, Your Honor. I would like to make a suggestion, though. These groups of papers being

1555 offered as they are it is like eating too hearty a meal too rapidly, as far as our digesting the record is concerned, and if Mr. Wooden will just run through those, indicating the date of the letter and addressee and identify it so we will be able to following the record a little more intelligently it would be helpful to us.

Mr. Wooden: Exhibits 174-A and B are a copy of a letter dated September 3, 1935, from W. D. Sankey, Jr., Assistant Salesmanager of the Lone Star Cement Company at Birmingham, Alabama, to J. F. Neylan, Vice-President, New York office. I should have said the Lone Star instead of the International.

Exhibit 174-C and D are a copy of a letter dated September 11, 1935, from J. F. Neylan, Vice-President, to George H. Reiter, Chairman, Trade Practice Committee, Cement Institute.

Mr. Leisure: Did you give the date on that last one?

Mr. Wooden: Yes. Exhibit 174-E is a copy of a letter dated September 13, 1935, from J. F. Neylan to W. D. Sankey.

Exhibit 174-F and G comprise a copy of a letter dated September 13, 1935, from the Chairman, Trade Practice

Committee, initials GHR, to Mr. E. D. Hill of the Louisville Cement Company, and C. A. Brooke of the Mon-
1556 arch Cement Company.

Exhibit 174-H is a copy of a letter from E. D. Hill to George H. Reiter, Chairman, Trade Practice Committee, Cement Institute, dated September 16, 1935.

Exhibit 174-I is a copy of a letter from the Monarch Cement Company by C. A. Brooke, dated September 16, 1935, addressed to George H. Reiter, Chairman, Trade Practice Committee.

Exhibit 174-J is a copy of a letter from J. F. Neylan dated September 23, 1935, to George H. Reiter, Chairman, Trade Practice Committee, Cement Institute.

Examiner Norwood: You offered those, did you?

Mr. Wooden: Yes.

(COM. EX. 174-A to J was offered and received in evidence.)

Mr. Wooden: For the light which they throw on the transaction that we have been dealing with through the witness Rice I want to read these papers, and unless exceptions are noted by me in the course of the reading I would like to have them on the face of the transcript.

Mr. Leisure: Your Honor, they are in evidence. I do not know that there is any necessity for reading
1557 them into the record.

Examiner Norwood: I think you are right in principle on that. If counsel will just read short extracts so as to direct attention to this testimony, to serve more or less as a glorified index, it would help us all.

Mr. Wooden: That is the primary purpose, that some of the more important exhibits may be indicated as to their importance by their presence in the transcript.

Examiner Norwood: I will ask the counsel to please make as short an extract as he can.

Mr. Wooden: Exhibits 174-A and B,—and it is to be noted, I think, Your Honor, that all this is several months after the ending of the code period,—the letter to J. F. Neylan, dated September 3, 1935, I will just try to shorten it by characterizing some of the matter that it relates to. The letter describes the opening of the bids on this 45,000 barrels of cement at Greenville, and the attendance of Mr. Lloyd, and a report as to the bids of all companies except Louisville Cement and Monarch Cement, showing the destination cost of $2.61177 and $2.82, the commercial delivered price. Then it says:

"The Louisiana Cement Company left Item I 1558 blank,"—I wonder whether that is "Louisiana" or "Louisville"? It says "Louisville" here anyway.—"left Item 1 blank and under Item 1-A bid $.61177 but did not indicate that it was a 'destination cost to the U. S. Government,' neither did they include the cut back clause. The Monarch Cement Company attached to their bid a specific work quotation form and in the face of this form opposite price inserted 'destination cost.'

"You will recall that last year the Louisville Cement Company submitted a similar bid and in making award the U. S. Engineers Office stated as a reason for award that while there was no difference in the net cost to the Government that the price f. o. b. Greenville placed the responsibility for delivering the cement on the cement company rather than on the Government and relieved the Government of the paper work necessary in connection with the issuance of Government bills of lading and settlements between the Government and railroads on land grant freight rates.

"We did everything possible to have our bid considered on an equal basis with those of our competitors but have little hopes of sharing in this business."

Mr. Neylan, in writing to George H. Reiter on September 11, 1935, describes the bidding on this transaction by these two companies, Louisville and Monarch, and 1559 comments:

"So far as the Louisville Cement Company's bid is concerned, we believe it will be construed as a destination price and the same is true of the Monarch Cement Company. This will, of course, have the effect of making the Monarch Cement Company's bid low and they undoubtedly will be awarded the business.

"According to our computation the Monarch Cement Company's net realized at Humboldt, Kansas, is very low and their action in quoting as they did will unquestionably result in much unfavorable comment on the part of the U. S. Engineers such as was experienced after the original bids received at Fort Peck.

"We believe it is within the province of the Trade Practice Committee to determine from both the Louisville Cement Company and the Monarch Cement Company the reason for bidding as they did since in neither case did these companies file their intention to so bid and all members

of the industry, therefore, had every right to expect they would meet the filing of those companies who did file with the Cement Institute in accordance with the procedure which the industry has grown to consider as proper.

"Will you please, therefore, investigate and for that purpose you may consider this as a formal complaint."

On September 13, 1935, Mr. Neylan, writing to W.
1560 D. Sankey, Exhibit 174-E, said:

"The bid of the Monarch Company not only prevents mills which should have the privilege of supplying this cement from participating in the order but likewise reduces the net realized to the Monarch Company to a point which lays the whole industry open to criticism.

"It seems too bad that the standard of intelligence in the cement industry is not high enough to realize that a desire to secure one order may have the effect of adversely affecting business relations of the whole industry involving many millions of barrels of cement, to say nothing of creating the impression that the margin of profit is inordinately high.

"We understand award has been made and Monarch will probably ship."

On September 13, 1935, Mr. Reiter, Chairman of the Trade Practice Committee, writes the officials of the Louisville Cement Company and the Monarch Cement Company, stating:

"Complaint has been filed against each of you on the basis of bids submitted on September 3 to the U. S. Engineer Office at Vicksburg, Mississippi, for delivery of 45,000 barrels of cement to the U. S. Government Spur Track at Greenville, Mississippi. The facts stated are as follows:"

1561 Then a quotation appears from the letter which I have just read, written by Mr. Neylan. After making the quotation Mr. Reiter closes:

"We will appreciate prompt and complete information from you on this subject."

He indicated a copy of his letter went to Mr. Neylan.

Writing to Mr. Reiter on September 16, 1935, the Louisville Cement Company answered the letter just referred to, stating what it had bid, at destination cost of $2.61177, and inserted a clause explaining how the Government might arrive at its contract price f. o. b. cars Speed, Indiana.

"We took particular pains to insert in this form that this bid was the destination cost to the U. S. Government.

We think the Government's interpretation of our bid was in error."

Indicating copies of that letter were sent to G. F. Coffin, F. M. Cogan, E. P. Lucas, J. F. Neylan, S. W. Storey, L. T Sunderland, G. E. Warren and T. J. McFadden.

The Monarch Cement Company, on September 16, 1935, Exhibit 174-I, wrote Mr Reiter:

"We bid the destination cost price secured from you and inserted the words 'destination cost' after the
1562 price in the bid but inadvertently left off the customary rider in connection with the destination cost price.

"After the bids were opened and we were apprised of our error, I sent our Texarkana sales representative to Vicksburg to explain our bid, but they had already accepted it as a destination price and wired us shipping instructions and dispatched their Inspector to our mill.

"I regret the mistake very much and personally take the blame for I reviewed the bid before mailing it.

"Had we intended the bid as a delivered price we certainly would have filed it.

"I assure you the situation is most embarrassing to our company and especially to me."

Signed by C. A. Brooke, Sales Manager, Monarch Cement Company, with copies of that letter, as indicated, sent to G. F. Coffin, F. M. Coogan, E. P. Lucas, J. F. Neylan, S. W. Storey, L. T. Sunderland, G. E. Warren and T. J. McFadden.

Exhibit 174-J is a letter from Mr. Neylan to Mr. Reiter acknowledging the copies of the responses received from the Louisville and Monarch Companies, suggesting that a copy of the bid as submitted by the Louisville Company ought to be secured in order that the Trade Practice Committee might review it.

1563 "Undoubtedly the Louisville Company has a copy of the bid in its file and should be willing to surrender it to the Trade Practice Committee with the understanding that it will be returned to them after it has served its purpose.

"So far as the response from the Monarch Cement Company is concerned, it is far from satisfactory. The Monarch Cement Company has done two things. In the first place, they have gone into a territory where they normally do not solicit business and have quoted on a basis contrary to that generally accepted in the section in which

they operate. In the second place they have laid the entire industry open to criticism and have confirmed in the minds of government officials the statement oftimes made by them that the cement industry is obtaining an inordinate profit on the sale of its product, and to defend this theory they point to bids similar to that of the Monarch Cement Company where, according to our calculations the net realized to that company represents an absorption of about 50 cents per barrel. The Government contends that if a mill is able to sell cement at one point and take an absorption of forty to fifty cents per barrel, then the price at home is altogether too high and ayone who has any common sense is forced to agree that the gov-
1564 ernment's viewpoint is not entirely wrong.

"We appreciate the fact that the Monarch Cement Company may be in an embarrassing position, but the main question has been left unanswered, that is, what are they going to do about it."

Mr. Rice, will you resume the stand?

The witness identified Com. Ex. 175-A as an abstract of the bids received in response to an invitation issued by the United States Engineer Office at Tucumcari, New Mexico, No. 36-219, for furnishing 6,000 barrels of cement. Bids opened April 23, 1936; Com. Ex. 179-B to I as a copy of the invitation issued in response to which the bids that are abstracted on this paper were received.

Mr. Wooden: I offer these papers for the record and tender the copies of the original bids for checking pur-
poses.

1565 (The documents were handed to counsel for the respondents.)

Mr. Leisure: Are the invitations here, Mr. Wooden?

Mr. Wooden: That is part of the exhibit.

Mr. Leisure: Where is the abstract?

Mr. Wooden: That is right at the top.

Mr. Leisure: I see.

Mr. Wooden: Is there any objection?

Mr. Leisure: No objection.

(COM. EX. 175-A to I inclusive was offered and received in evidence.)

Q. Who were the bidders and what were their bids per barrel in that case?

A. Bids were received from the Monarch Cement Company, Ash Grove Lime & Portland Cement Company, Le-

high Portland Cement Company, Southwestern Portland Cement Company, Oklahoma Portland Cement Company, United States Portland Cement Company, Consolidated Cement Corporation, Trinity Portland Cement Company, Lone Star Cement Company, Universal Atlas Cement Company and the Colorado Portland Cement Company, all quoting the price of $3.286854, with 10 cents per
1566 barrel discount for 15 days.

Q. Was that a delivered price?

A. The abstract does not state. The bids were solicited on f.o.b. mill.

Q. Does the invitation show that bids were solicited on an f.o.b. mill basis

A. On the front page here (indicating).

Q. You can tell by looking at the bids themselves whether they were on a delivered or f.o.b. mill basis, can you not?

A. (Examining documents:) These are all destination cost prices.

Q. And the figures you gave were destination cost prices?

A. That is correct.

Q. Were any delivered prices, as distinguished from destination cost prices, included in the bids? I believe your invitation did not call for it, is that right?

A. Did not call for it. Those prices you can sort of figure both ways, depending on how you ship.

Q. How was the contract awarded in that case?

A. The award in this case was made to the Lehigh Portland Cement Company after a drawing by lot.

1567 The witness identified Com. Ex. 176-A as a copy of an abstract of bids received by the District Engineer at Conchas Dam, New Mexico, for delivery of 250,000 barrels of cement to Newkirk, New Mexico; bids opened September 23, 1937; Com. Ex. 176-B to R as a copy of Invitation No. 38-30 under which the bids received or abstracted on 176-A are recorded.

Mr. Wooden: I offer these papers for the record and tender the copies of the original bids for checking purposes with the abstract.

(The documents were handed to counsel for the respondents.)

Mr. Leisure: No objection.

(COM. EX. 176-A to R inclusive was offered and received in evidence.)

Q. Now, Mr. Rice, I notice in this abstract the bids are tabulated under two headings, one entitled "Principal bid f.o.b. shipping point" and the other "Alternate bid
1568 f.o.b. Newkirk, New Mexico." There are some figures in each of those columns. In other places the words "No bid" are entered. Now I wish you would take the copies of the original bids which are here and tell us if the tabulation on abstract correctly puts the bids into those respective columns whose titles I read.

Mr. Leisure: Would you mind offering those bids just as you did before?

Mr. Wooden: Yes. Before answering that question, Mr. Rice, I will have the bids themselves numbered as I did on a previous occasion.

(The documents referred to were marked for identification "Commission's Exhibits 177-A to G," inclusive.)

Mr. Wooden: These bids have been numbered for identification Exhibits 177-A to G, inclusive, and I will offer them for the record. I assume there will be no objections, in view of the abstract already having gone in without objection.

Examiner Norwood: Received as marked.

(COM. EX. 177-A to G inclusive was offered and received in evidence.)

Examiner Norwood: They are the supporting bids to Exhibit 176-A to R.

By Mr. Wooden:

1569 Q. Do you want the question read, for your understanding?

A. No, I just wanted to see whether I was in the right column. Answering your question, there are no strictly f.o.b. shipping point bids here, they are destination cost prices which have been inserted in the f.o.b. shipping point column.

Q. Are there among the bids what you might call genuine delivered prices at Newkirk, or are they all Government destination cost bids?

A. No, there are some delivered.

Mr. Zimmerman: Mr. Wooden, you say "genuine delivered prices"?

Mr. Wooden: As distinguished from Government destination cost bid.

Mr. Zimmerman: I do not think we have had quite clearly what the distinction is as yet. Could we not now get what the basis of this distinction is? What does counsel mean by his distinction?

Examiner Norwood: I think he is coming to that.

Mr. Wooden: Your Honor, on that point we have had various witnesses that touched upon it. We will have other witnesses that will touch upon it and go into it even more fully. I do not care to ask this particular witness along those lines. I am going to have other witnesses that will, I think, satisfy Mr. Zimmerman completely on
1570 that point.

Mr. Zimmerman: If Your Honor feels that you are quite familiar with it we will waive clarification, as far as Mr. Zimmerman is concerned. I do not think the record is clear on what the distinction was in counsel's question.

Examiner Norwood: Counsel can bring that out on cross-examination. You can ask those questions on cross-examination.

Mr. Zimmerman: That is perfectly all right.

The witness identified Com. Ex. 178-A as a photostatic copy of an abstract of bids received by the District Engineer at Pittsburgh, Pennsylvania, for furnishing 1,200,-000 barrels of Portland cement for Tygart Reservoir
1571 Dam, located just outside of Grafton, West Virginia. In checking the invitation, he said the opening
1572 date is January 18, 1935; Com. Ex. 178-B as a photostatic copy of an advance abstract of bids received in response to invitation 35-264 furnished to the District Engineer at Pittsburgh, Pennsylvania for furnishing cement to the Tygart Reservoir project. This being an advance abstract, there does not appear on here the quantity; Com. Ex. 178-C as a copy of the abstract of bids of which this is an advance copy, opened February 16, 1935, for furnishing 1,200,000 barrels of Portland cement; Com. Ex. 178-D to O as a copy of the invitation for bids on which it is based.

Mr. Wooden: I will offer these papers for the record, and I tender the copies of the bids from which the abstracts were made.

Mr. Leisure: May we look them over during the recess?

Examiner Norwood: Received subject to check.

(COM. EX. 178-A to O inclusive was offered and received in evidence.)

1573 Washington, D. C.,
Friday, January 7, 1938.

1574 HERBERT H. RICE resumed the witness stand as a witness for the Commission, and testified further as follows:

Direct Examination by Mr. Wooden (Continued).

Q. Mr. Rice, referring to this bidding on the 1,200,000 barrels of Portland cement for the Tygart River Reservoir Dam in January, 1935, who were the bidders and what was the amount of their bids per barrel?

A. (Examining document:) The bids receeived January 18, 1935, by the District Engineer at Pittsburgh for the cement at Tygart Dam, and the following companies submitted bids in the amount of $1.84 per barrel: Southwestern Portland Cement Company, Bessemer Limestone & Cement Company, Universal Atlas Cement Company, West-Penn Cement Company, Lehigh Portland Cement Company, Standard Portland Cement Company, The Diamond Portland Cement Company, Wabash Portland Cement Company, Superior Cement Corporation, Coplay Cement Manufacturing Company, Alpha Portland Cement Company, the Washington Building Lime Company, Huron Portland Cement Company, Medusa Portland Cement Company, Lawrence Portland Cement Company, Green Bag Cement Company of Pennsylvania, and the Pittsburgh Plate Glass Company; 17 bids.

1575

Q. Were those bids of $1.84 a barrel on a delivered basis or f.o.b. mill?

A. Well, this abstract does not show.

Q. Can you tell from the bids? The bids are here themselves, I believe.

A. (Examining documents:) These are not the bids on this opening.

Q. Now referring to Exhibits 178-A, 178-B and 178-C, there are three different papers there (handing documents to the witness): Will you straighten out for us, if it needs to be straightened out, which particular paper of those I named relate to and is supported by the bids which accompanied those papers?

A. Well, these bids are here in response to Invitation 35-264 (indicating).

Q. Which bids? Are you referring to all three of those papers when you say that?

A. No, these bids refer to this invitation (indicating), and these (indicating) are the abstracts on that.

Q. When you say "these" refer to them by number.

1576 A. 178-B and C are copies of abstracts of bids received in response to Invitation No. 35-264 for furnishing 1,200,000 barrels of Portland cement. These are the abstracts (indicating).

Q. Did you say that those papers there (indicating), 178-B and C, were the tabulations on the readvertised bids?

A. That is right. It is my recollection that these bids were all rejected (indicating). The price here is $1.84 (indicating), and under the subsequent advertisement we got $1.70 per barrel f. o. b. dam site.

Q. All right. That is shown by the Exhibits 178-B and C, is that right?

A. That is correct.

Q. Who were the bidders that bid $1.70?

A. Lehigh Portland Cement Company, the Bessemer Limestone & Cement Company, West-Penn Cement Company, Standard Portland Cement Company, Wabash Portland Cement Company, Pittsburgh Plate Glass Company, the Washington Building Lime Company, Alpha Portland Cement Company, Universal Atlas Cement Company, Green Bag Cement Company of Pennsylvania, and the Medusa Portland Cement Company; 11 bids.

Q. Now can you tell from the bids which accompanied that tabulation whether the $1.70 price was a mill price or delivered price?

A. (Examining papers.) These were all delivered prices.

1577 Q. Did the invitations call for a mill price?

A. No, the invitation called for delivery f. o. b. railroad cars or rail siding at the dam site.

Q. Was there any land grant rate involved in that bidding?

A. Without a reference to one of these maps which shows the land grant rate it would be impossible for me to say definitely, but my recollection is that the location

of the plants here and the delivery site are such that it would not involve any land grant rate.

Q. How many concerns were there that bid $1.70 on that readvertisement?

A. Eleven.

Q. Do you know why the bids were readvertised in that case?

A. Only in a general way. Several times we have in the past received bids which we thought were too high, and my recollection in this case would be that that is the same reason, in view of the fact that we received a little lower price in the second advertisement.

Mr. Wooden: Your Honor, I have here a paper which I have had marked for identification as Commission's
1578 Exhibit 179. It is a copy of the executive order issued by the President under date of June 29, 1934. I assume there will be no question about its authenticity. I think we are all generally familiar with it. I would like to submit it to the counsel for the respondents, and offer it at this time.

(The document was handed to counsel for the respondents.)

Mr. Leisure: No objection, Your Honor.

(COM. EX. 179 was offered and received in evidence.)

Mr. Wooden: This is the order that was quite generally known as the one which permits bidders on Government contracts, although operating under codes, to make a deduction or reduction below their filed prices as much as 15 per cent.

Mr. Zimmerman: May I ask, if the Examiner please, the purpose of that, Mr. Wooden, is to show that there had been some change in the practice after this executive order, or that there should have been?

Mr. Wooden: Why, the point is that we just had a case here involving identical bidding in January and February,
1935, some seven or eight months after this order,
1579 interpreting and modifying the codes to that extent, was in effect.

Mr. Zimmerman: This order changes the practice? Prior to the entry of this order the bids were expected to be uniform and after this order it allowed a differential of 15 per cent, is that it?

Mr. Wooden: I would not say the bids were expected

to be uniform, I would say that bidders were expected to conform to their filed prices.

Mr. Zimmerman: I see.

By Mr. Wooden:

Q. Mr. Rice, referring to your invitations to bid in that Tygart River case, did the invitation call for standard Portland cement or some special quality of Portland cement?

A. (Examining document.) It called for Federal specifications cement, the usual type we called Federal Specifications SS-C-191.

Q. Can you say whether that was the equivalent of standard cement or not?

A. I have never heard it questioned that it was anything other than the standard grade of first quality cement.

Q. Did the invitations to bid call for the bidders giving information on various factors of quality, such as compressive strength and chemical content?

A. There is a data sheet attached to the invitation 1580 on which there are numerous questions asked.

Q. Will you state what questions were asked relating to the quality of the cement which the bidders were bidding on?

A. Well, there are several questions on chemical composition and compound composition, and fineness, and compressive strength. Those are the usual questions, and I think they are all pursuant to that Federal specification.

Q. Will you take Exhibit 178-C and read the various returns made on the quality of cement that each bidder offered to furnish, taking each item separately and reading across so that we will have a comparison of what each bidder's cement was on that particular point?

A. Well, in the chemical composition of cement one is loss of ignition in percentage. Do you want the bidders by names?

Q. Yes.

A. Lehigh Portland Cement, 1.5; Bessemer Limestone, 2 per cent; West-Penn Cement Company, .3 of 1 per cent minimum and 1.5 per cent maximum; Standard Portland Cement Company, 1.5 per cent maximum; Wabash Portland Cement Company, .62 per cent; Pittsburgh Plate Glass Company, .68 per cent; Washington Building Lime

Company, 1 per cent; Alpha Portland Cement Company, .85 per cent; Universal Atlas Cement Company, 1.25 per cent; Green Bag Cement Company of Pennsylvania, 1 per cent; Medusa Portland Cement Company, 1 per cent.

1581 Q. Now take the next item.

A. The next item is insoluble residue in percentage: Lehigh Portland Cement, .1 per cent; Bessemer Limestone & Cement Company, .50 per cent; West-Penn Cement Company, a minimum of .18 per cent and maximum of .30 per cent; Standard Portland Cement Company, .2 per cent; Wabash Portland Cement not answered; Pittsburgh Plate Glass Company, .35 per cent; Washington Building Lime Company, .85 per cent; Alpha Portland Cement Company, .25 per cent; Universal Atlas Cement Company, .50 per cent; Green Bag Cement Company of Pennsylvania, .2 per cent, and the Medusa Portland Cement Company, .3 per cent.

Item 3 is sulphuric—now you got me on the next word here, a-n-h-y-d-r-a-t-e, in percentage.

Examiner Norwood: What is the object of putting all of that into the record?

Mr. Wooden: Your Honor, it is just this: This is a complicated exhibit. No one will understand what it is all about unless we bring out on the face of the record the variations that the bidders' own bids showed in the various items affecting the quality.

Examiner Norwood: Can not you illustrate by just a few figures and then describe it in general terms?

Mr. Leisure: That is all argument, it seems to me, what the counsel stated, that is argument. The exhibit

1582 is the best evidence. It speaks for itself. If he has this sort of thing that he wants to take up and argue about later, that is his privilege, I suppose, but the exhibit speaks for itself.

Examiner Norwood: I think we can make it a little more sketchy with a few illustrations.

Mr. Wooden: I am willing to stop right here. I think he has given enough illustrations, but similar variations will be found, I think, in the quality factors of the other bidders on other points.

Examiner Norwood: I think the explanation would be very valuable to us.

Mr. Wooden: It goes pretty directly to the proposition

of whether cement is as much a standardized commodity as claimed.

Mr. Wooden: Before leaving that particular point, Your Honor, I should like to say that the exhibit shows variations in the compressive strength tests as well, which I understand to be one of the important quality factors.

Examiner Norwood: Yes.

1583 The witness identified Com. Ex. 180-A to C as a copy of an abstract of bids received in response to invitation No. 38-22, received by the District Engineer at Vicksburg, Mississippi, on August 30, 1937 for furnishing 1200 barrels of Portland cement to be used at Monroe, Louisiana; Com. Ex. 180-D to K as a copy of the invitation to bid, No. 38-22, for furnishing this cement.

1584 Mr. Wooden: I offer those papers for the record, and tender the original bids from which the abstract was compiled for checking.

Mr. Leisure: No objection.

(COM. EX. 180-A to K inclusive was offered and received in evidence.)

Q. How many bidders there on this letting and what were their bids?

A. There were 15 bids received. The destination cost price in each case was $2,772, and the f. o. b. price at Monroe, Louisiana, was $3,060 in all cases except that of bidder No. 12, the Consolidated Cement Corporation who did not submit a bid under that item.

Q. The abstract does not show the per barrel price, does it?

A. No, sir.

Q. Will you take the bids themselves and state what the per barrel price was of each bidder on the destination cost basis first, and then later on the delivered basis?

1585 Mr. Wooden: The bids have been numbered for identification 181-A to O inclusive, and I will offer them, your Honor.

(COM. EX. 181-A to O inclusive was offered and received in evidence.)

The Witness: The bids on the destination cost basis were $2.31 per barrel.

By Mr. Wooden:

Q. By all bidders?

A. By all bidders.

Q. Were the bids on the destination cost basis accompanied by a so-called control clause?

A. I seem to recall seeing it. Do you want me to go through them again? I am sure they all had these slips pasted on, printed or stamped.

Q. Will you read at this point the control clause that was attached to the Monarch Cement Company bid, Exhibit 181-E?

A. (Reading.) "The destination cost to the United States Government at Monroe, Louisiaia as shown in our bid is based on the use of the land grant rate from Humboldt, Kansas to Monroe, Louisiana, and is included in this figure. This destination cost is quoted only so that the United States Government can determine its cost for invoicing purposes f. o. b. cars our mills at Humboldt,

Kansas, and it shall not be considered a delivered
1586 price at destination. The United States Government shall determine its cost our cars at Humboldt, Kansas, for invoicing purposes for shipments moving on United States Government bills of lading by subtracting from the destination cost in our bid either the land grant rate as determined by the United States Government as being applicable from Humboldt, Kansas to Monroe, Louisiana, or the commercial rate, or any special rate filed with the United States Government prior to the opening of bids, whichever figures the lowest rate. If our delivered destination cost to the United States Government is less at the time of shipment than named in this invitation, the lower price will apply."

Q. What are the papers I show you marked for identification as Commission's Exhibit 182-A to L inclusive?

A. 182-A is a photostatic copy of an abstract of bids received on June 12, 1928 by the office of the Third Mississippi River Commission District at Vicksburg, Mississippi, for furnishing 120,000 barrels of Portland cement.

182-B to L is a copy of the invitation which has
1587 been numbered 520-28 under which the bids abstracted here were received.

Q. What are the papers marked for identification 183-A to I inclusive?

A. These are the bids received by the Third Mississippi River Commission District in response to this invitation 520-28.

Mr. Wooden: I offer these documents.

Mr. Leisure: We object to this exhibit, of your Honor pleases, on the ground that on the statement by the witness, these bids were opened as far back as 1928. I do not know what statute of limitations your Honor expects to apply here, or what rule of limitation, but certainly all of the reasons for having a Statute of Limitations are present here. We have seen in one instance the witness Treanor is now dead and unable to explain letters which have been offered in evidence. If it is the ordinary statute of three years, that is long past in this eight-year period.

1588 If it is the conspiracy statute of five years, that has passed, and I submit that if the rule of equity is applied, on the ground of laches, 1928 is too far back. The record already shows that the Commission was conducting these investigations a' ar back as 1931. I submit that some rule should be applied here as in all cases as to the limitation of receiving evidence.

Mr. Wooden: Is there any further statement by any further counsel? I will make my statement then.

(No response:)

Mr. Wooden: Of course, your Honor, there is no Statute of Limitations applicable here at all. The attempt to invoke the principle of a Statute of Limitations by a ruling of your Honor is totally uncalled for and totally unwarranted on well-settled decisions of the courts on such cases. It has been well-settled that a conspiracy may be traced back to its beginning no matter how far back it goes. It is not a question here of holding the respondents criminally liable in a case such as a criminal proceeding. I might say that even there, my understanding of the law is that even in a criminal case you can trace the alleged conspiracy as far back as you want to, as far as it goes. They simply cannot be held liable for things done prior to the period specified in the statute.

1589 Mr. Zimmerman: This is offered then, on the theory, that this pertains to the beginning of the alleged conspiracy?

Mr. Wooden: Oh, no, I did not say that.

Examiner Norwood: I think those matters can be shown under rulings in several cases, as evidence of what continued to be done and what is being done now as part of the entire picture.

Mr. Zimmerman: Well, I should like to just add the

objection that it is not at all relevant, material or pertinent.

Examiner Norwood: Any way, the respondents will have the advantage of their exception, and they can take that up with the Commission and with the court. I shall let it in. Objection overruled. Received as marked, Exhibits 182-A to L and 183-A to I.

(COM. EX. 182-A to L and 183-A to I were offered and received in evidence.)

Q. Now, Mr. Rice, will you take the original bids on this letting, Exhibit 183-A to I inclusive, and tell what the bidders' per barrel bidding was?

A. The Alpha Portland Cement Company bid $2.55 per barrel.

Q. On what basis?

1590 A. F. O. B. cars at Greenville, Mississippi.

Q. Did they submit a bid on any other basis or propose to furnish the cement on any other basis?

A. They allowed a deduction for the cement if purchased f. o. b. mill. On this photostat it is not quite clear, but the total deduction is $86,056.80 on 120,000 barrels.

Q. You cannot tell what the per barrel was?

A. It looks like .71714. In fact, it must be that to be less than $100,000.

The Marquette Cement Manufacturing Company submitted a price of $2.55 per barrel and offered an allowance of 72 cents for freight if purchased at the mill.

Pennsylvania Dixie Cement Corporation quoted a price of $2.33866 and offered an allowance of 76 cents for freight if purchased at the mill.

The Louisiana Portland Cement Company quoted a price of $2.25 and $2.35.

Q. Is that delivered?

A. Those are f. o. b. cars and f. o. b. barge at their mill.

The Lehigh Portland Cement Company quoted a price of $2.55 and offered an allowance of 70 cents freight at the mill.

Missouri Portland Cement Company quoted a price of $2.55 and allowed 78 cents for freight at the mill.

1591 The Alabama Portland Cement Company quoted a price of $2.65 and offered 61 cents allowance for freight at the mill.

Q. Will you say whether or not there was a special discount of 10 cents off of that price?

A. Yes, I was just trying to figure if it was. They say "If shipments of cement conforming to specification Bureau of Standards No. 33 will be accepted, our prices will be as follows"—and then they offer $2.55, a reduction of 10 cents.

The Alabama Portland Cement Company quoted $2.65 and offered an allowance of 70.95 cents f. o. b. mill at Birmingham, Alabama, and an allowance of 70 cents f. o. b. mill at Boyles, Alabama.

Q. Was there a discount of 10 cents offered there; a special discount?

A. They made the same offer: "If shipments of cement conforming to specification Bureau of Standards No. 33 will be accepted, the price is $2.55."

National Cement Company quoted a price of $2.55. They bid only on 30,000 barrels and offered an allowance of .799393 f. o. b. mill.

Q. I notice in the abstract tabulating the price per barrel f. o. b. Greenville gives some prices $2.55, and for the same company $2.45. Can you explain what the
1592 difference between $2.45 and $2.55 is due to when applied to the same company?

A. I presume that that is the discount that has been figured there, because it is my understanding that that is a 10-cent discount. The 10-cent allowance for sack applies to each sack, and that would be 40 cents a barrel, so I think that is with the discount figured in. It is the net price.

Q. That is in addition to the 10 cents off the $2.65 price?

A. They all offer 10 cents discount. That is just a straight cash discount.

Q. Then, is it your interpretation of the situation that each company bid $2.55 delivered at Greenville, and $2.45 with the 10-cent discount, except the Penn Dixie?

1593 The Witness: The abstract of bids shows that all bidders who bid on an f. o. b. Greenville basis bid $2.55 and $2.45, with the exception of the Penn Dixie Cement Corporation which bid $2.23866.

EVERETTE MacINTYRE was recalled as a witness on behalf of the Commission, and having been previously sworn, testified further as follows:

1594 The witness identified Com. Ex. 184 A to R inclusive as photostats of documents which he selected from the files of Mr. Joseph Young, an official of the Lehigh Portland Cement Company, Allentown, Pennsylvania, on September 2, 1931. The photostats were made here in Washington in the offices of the Commission and compared by him with the original papers which were returned to Mr. Young of the Lehigh Company.

1595 Examiner Norwood: What do you say to those exhibits?

Mr. Leisure: Your Honor, where there is a single exhibit with a number of pages is there any objection to it being marked from A to R, and so forth, without any description, but where the exhibits are a complete file, as in this instance, being telegrams and letters, I would like to ask Mr. Wooden to mark them so that we can follow them on the record, identify them in some way.

Mr. Wooden: All right.

Examiner Norwood: Go ahead.

Mr. Wooden: I will state what each one is. Are they received, however?

Mr. Leisure: No, not yet. That is one of the reasons I want them separately identified.

Mr. Wooden: All right. Exhibit 184-L is an inter-office letter dated June 20, 1928, from T. P. Refbord, Assistant Traffic Manager of Lehigh, to F. E. Dickert, Sales Department.

Exhibit 184-F appears to be an office letter from the Allentown office to the Birmingham office, attention Mr. Siegfried, dated June 9, 1928, the initials at the bottom being "J. B."

Exhibit 184-G is an inter-office letter from T. P. Refbord to J. C. Bowen, dated June 11, 1928.

1596 Exhibit 184-A is an inter-office letter from Ernest Alley to the Birmingham office of Lehigh, dated April 26, 1928.

Exhibit 184-D is a telegram from A. M. Houser to L. P. C. Co., Allentown, dated June 6, 1928.

Exhibit 184-B is an inter-office letter from the Birmingham office to the Allentown office, dated June 4, 1928, with the initials "R. J. S." at the bottom.

Exhibit 184-C is a sheet containing figures relating to Boyles, Spocari, and other points.

Exhibit 184-E is a telegram from A. M. Houser to Lehigh at Allentown, dated June 7, 1928.

Exhibit 184-J is an inter-office letter from J. C. Bowen to F. E. Dickert, dated June 15, 1928.

Exhibit 184-I is an inter-office letter from Birmingham office to Mr. Bowen, Allentown office, dated June 14, 1928.

Exhibit 184-H is a letter from Dave Cowan and Ernest Alley to the Birmingham office, copy to Allentown, dated June 12, 1928.

Exhibits 184-O and P are a memorandum dated July 6, 1928, re Greenville letting.

Exhibit 184-K is a tabulation relating to Greenville, Mississippi, bids, showing the bids of various companies, freight allowances, land grant rates, de-
1597 livered price.

Exhibit 184-Q is an inter-office letter from Ernest Alley to Mr. Houser, copy to Mr. Bowen, dated February 28, 1930.

Exhibit 184-N is a letter by Ernest Alley from Vicksburg, dated July 2, 1928, regarding bidding at Greenville, Mississippi.

Exhibit 184-M is a letter from the Allentown office to Birmingham, copy to Mr. Alley, dated June 29, 1928.

Exhibit 184-R is a letter from Ernest Alley to Birmingham, copy to Allentown, dated June 16, 1930.

Mr. Leisure: The statement of counsel in his offer, Your Honor, shows that Exhibits 184-O and P and 184-K are memoranda which are not in any way connected with any of these respondents. They are incompetent and immaterial as far as these respondents are concerned, unless it is connected in some way. I do not know who wrote the memoranda, and there is nothing in the record so far to show that they are material.

Examiner Norwood: Memoranda in the files of this cement company?

Mr. Wooden: That is the witness' testimony, yes, relating to the subject-matter that we are dealing with.

Examiner Norwood: Does it connect up with the other documents?

1598 Mr. Wooden: I would say so, yes, sir.

(COM. EX. 184-A to R was offered and received in evidence.)

Mr. Wooden: I want to read Exhibit 184-I. It is

an inter-office letter from the Birmingham office to Mr. Bowen, dated June 14, 1928:

"Subject: Government Cement Requirements—Greenville, Miss.

"Dear Sir:

This is a sad state of affairs as you have doubtless noted from the reports of the opening of bids June 12th.

"Penn-Dixie quoted a Greenville price of $2.33866 per barrel. They took the local mill base of $1.85 and added Boyles land grant rate of $.48866 to arrive at their price and their method is a great one, to say the least.

"We have been in conversation with Brown about it and he admits that they made a 'mess' of their bid and blames it on his office. There should not have been any possibility, though, of misunderstanding or of not knownig how to figure the bid. We had the matter up before with them very explicitly in connection with the bids that were taken
1599 in January. Their theory of figuring was much the same on that occasion as you will note by referring to Mr. Dent's report of January 31st.

"As to the present bids, the result is that on delivered prices Penn-Dixie is low by 21 cents per barrel.

"Yours very truly,

Birmingham Office."

The initials in the bottom left-hand corner are "R. J. S."

By Mr. Wooden:

Q. Mr. MacIntyre, do you know who the Mr. Brown is that is referred to in that document?

A. From the document itself and other information we obtained during this investigation it appeared that he was W. Jesse Brown, Southeastern Manager of the Pennsylvania-Dixie Cement Corporation.

Q. Do you know who the Mr. Dent was whose report is referred to?

A. A representative of the Lehigh Portland Cement Company in the Southeast.

Q. What kind of representative?

A. Sales representative.

Q. You mean a traveling salesman?

A. A little more than that. He was not one of
1600 their managers down there, Mr. Houser was their manager.

HERBERT H. RICE was recalled as a witness for the Commission and, having been previously duly sworn, testified as follows:

Direct Examination (Continued).

The witness identified Com. Ex. 185 A as a photostatic copy of an abstract of bids received for furnishing 50,000 barrels of Portland cement to the United States Engineer's Office, Vicksburg, Mississippi, on June 16, 1930, destination f. o. b. cars Greenville, Mississippi; Com. Ex. 185
1601 B to L as a copy of the invitation under which these bids were received; Com. Ex. 186 A to K as copies of the bids received in response to the invitation No. 30-515, of which Com. Ex. 185 A is an abstract.

Mr. Wooden: I offer both Exhibits 185 and 186, with the various sub-numbers and letters.

Mr. Leisure: No objection.

(COM. EX. 185-A to L inclusive and COM. EX. 186-A to K inclusive were offered and received in evidence.)

Q. Will you state now, Mr. Rice, who were the bidders and what their bids were per barrel delivered at Greenville, Mississippi?

A. Signal Mountain Portland Cement Company bid $2.80 per barrel f. o. b. Greenville. Lone Star Cement Company, $2.80 per barrel. Missouri Portland Cement Company, $2.80 per barrel. Lone Star Cement Com-
1602 pany, $2.70 per barrel. Marquette Manufacturing Company, $2.80 per barrel. Pennsylvania-Dixie Cement Corporation, $2.80 per barrel. Trinity Portland Cement Company, $2.70 per barrel. Alpha Portland Cement Company, $2.80 per barrel. Lehigh Portland Cement Company, $2.80 per barrel. Kosmos Portland Cement Company, $2.96 per barrel. Universal Atlas Cement Company, $2.80 per barrel.

Q. Now were there two Texas companies that you said quoted $2.70 per barrel?

A. The Lone Star you mean?

Q. Yes.

A. I guess I should correct my statement there. The $2.80 per barrel of the Lone Star Company is an Alabama company, and the $2.70 price submitted by the Lone Star Company was submitted by the Lone Star Cement Company of Texas.

Q. Was the Trinity the other?

Mr. Leisure: Does the record show the distinction? You mentioned Lone Star twice.

The Witness: I did, but I left off the State.

Mr. Leisure: Is it the same corporation or a different corporation?

The Witness: The bids are submitted by different persons. I have no way of telling.

Mr. Wooden: I think they have separate corpora-
1603 tions in different States.

The Witness: They are incorporated in the States of Alabama and Texas. They are separate corporations.

By Mr. Wooden:

Q. The other Texas company, was that the Trinity?

A. That is the Trinity Portland Cement Company of Dallas, Texas.

Q. Now if those two Texas companies quoted $2.70 a barrel how does it happen that those two companies appear on the abstract as showing the same total gross cost delivered by contractor as the other bids?

A. (Examining documents.) That gross cost delivered by contractor refers to the price submitted by these two bidders f. o. b. cars, contractor's mill, and these two Texas companies bid $1.79391 per barrel, or a total of $89,695.50, f. o. b. cars contractor's mill, and when commercial freight is added to it that is the basis of this computation.

Q. I asked you about the gross price delivered by contractor. Is not the gross price of the two Texas companies the same as all the others?

A. Yes. That is $2.70 per barrel delivered by contractor f. o. b. Greenville.

Q. Now you have been giving us figures, $2.80 for most of them and $2.70 for these two Texas companies, and yet
the total for both from the abstract appears to be the
1604 same. Can you explain why that is?

A. Those are the prices that they have put in their bids here, $2.70 per barrel, or a total of $135,000.

Examiner Norwood: Well, did they get the contract?

The Witness: There is no notation on the abstract as to who received the awards.

Examiner Norwood: Is that lower than the other bids?

The Witness: On the unit price it would be.

By Mr. Wooden:

Q. The abstract shows the gross delivered price to be the same. Why is that? Is there anything in the way of discounts or special discounts that are figured in the $2.80 and that are not figured in the $2.70?

A. Well, there is a discount of 10 cents per barrel allowed for payment of invoice in full within 15 days.

Q. Does that apply to all the $2.80 bids?

(Witness examines documents.)

Q. I can shorten it perhaps by asking you: Was there a special 10-cent discount? Was there a special 10-cent discount to the Government to be taken off the $2.80?

A. Well, in the case of those two bids in the Texas companies there was 10 cents for payment within 15 days.

Q. That is the regular term discount. I am asking you about a special discount because of it being a Gov-
1605 ernment purchase.

(Witness examines documents.)

Q. Look at the bid on Exhibit 186-B. Is there a rider there providing for a discount of 10 cents to the Government as such?

A. The price quoted herein that will be allowed at time of settlement of invoices, a Government discount of 10 cents per barrel.

Q. Do you find the same thing in all the other $2.80 bids?

A. Examining documents.) They all seem to have it.

Q. Did the two Texas bids at $2.70 have it?

A. (Examining documents.) The Texas companies appear to have a 10-cent discount.

Q. But not a special Government discount?

A. Just 10 cents for payment of invoices within a period of 15 days.

Q. The others had that too?

A. Yes, the others had that too, and also a special Government discount.

Q. So then it would appear, would it not, that the bids were all $2.70, if you put them on the same basis as to discounts?

A. They would all be $2.70, less one discount of 10 cents.

Q. Now what were the bids of the companies on an f. o. b. mill basis?

A. I am only speaking of the $2.80. All the bids
1606 on the $2.80 basis contained two 10-cent discounts.

The $2.70 bids from the Texas company had only one 10-cent discount. I am referring to this Kosmos Company.

Q. Now what were the respective bids on an f. o. b. mill basis per barrel?

A. The Kosmos Portland Cement Company bid $2.10 per barrel. The Trinity Portland Cement Company bid $1.79391 per barrel. The Lone Star Cement Company of Texas bid $1.79391 per barrel. The Pennsylvania-Dixie Cement Corporation bid $2.01758 per barrel. The Signal Mountain Portland Cement Company bid $2.04342 per barrel.

Examiner Norwood: Can not you just sum that up and say how many bid identical figures?

Mr. Wooden: These are not identical, Your Honor. That is the point. These are the mill bids. The delivered were identical, but you notice as he reads them there is a very wide difference between the mill bids.

Examiner Norwood: Go ahead.

The Witness (Continuing): The Missouri Portland Cement Company stipulate a deduction may be made if purchased f. o. b. mill in the amount of .878704.

Mr. Zimmerman: Off the record.

(Discussion off the record.)

The Witness: The Missouri Portland Cement Com-
1607 pany bid $2.80 per barrel and stipulated a deduction if purchased f. o. b. mill to be made in the amount of .878704.

Mr. Zimmerman: Yes.

The Witness: The Lone Star Cement Company of Alabama bid $2.097 per barrel. The Universal Atlas Cement Company quoted $2.80 at Greenville, and stated a deduction to be made if purchased f. o. b. mill in the amount of .769928 per barrel. The Lehigh Portland Cement Company bid $2.097. Alpha Portland Cement Company bid $2.0799, and the Marquette Cement Company bid $1.8002 per barrel.

Mr. Wooden: That is the point of this whole matter, Your Honor, that these widely varying and meticulously accurate per barrel bids at the mill are made, and they all make the same delivered prices.

1608 Mr. Leisure: Are there alternative bids shown there?

Mr. Wooden: I think the witness had better answer that.

The Witness: Bids were solicited for deliveries f. o. b. cars, contractor's mill under Item 1, and f. o. b. cars United

States Government spur track Greenville, Mississippi, under Item 1-A.

By Mr. Wooden:

Q. Some bid a straight mill price and a delivered price, and others bid a mill price in terms of a deduction from the delivered price?

A. From the delivered price.

Q. Referring back to that last bidding, do you know whether there were land grant rates involved there or not?

A. I could tell probably if I had the abstract.

Examiner Norwood: Which one is that?

The Witness: 185-A. (Examining papers.) It is my opinion that there were some land grants involved in some of those shipments.

1609 By Mr. Wooden:

Q. Do you mean to some mills, land grant rates would have been applicable and to other mills not?

A. That is my opinion.

Mr. Leisure: I do not think we should have this witness' opinion on the documents of this kind. If the documents showed there were land grant rates involved, we should have it, and not this witness' opinion.

Mr. Wooden: I would like to ask him on what he bases his statement.

Examiner Norwood: Go ahead.

By Mr. Wooden:

Q. On what do you base that statement?

A. There were very few land grant roads that are east of the Mississippi. There are some in the extreme south, but there are very few, and I am basing it on the fact that some of the mills are located in the vicinity of Texas and Missouri. In fact, there are a couple of them in Texas. There are some land grant roads, I think, running through Tennessee to a short extent.

Q. Can you say whether or not there are any land grant rates in Texas?

A. I think there are, but I would rather refresh my recollection by the use of a map rather than make a rash
1610 statement. From my experience, I would say there were.

The witness identified Com. Ex. 187 A as a photostatic copy of an abstract of bids received by the United States

Engineers Office at Vicksburg, Mississippi, for 60,000 barrels of Portland cement on November 9, 1932, for delivery at Greenville, Mississippi; Com. Ex. 187 B to L as a copy of the invitation numbered 33-93 of which this is an abstract; Com. Ex. 188 A to K as copies of bids received in response to invitation 33-93 received by the District Engineer at Vicksburg, Mississippi for furnishing 60,000 barrels of Portland cement.

Mr. Wooden: I offer these documents for the record.

Mr. Leisure: No objection.

(COM. EX. 187-A to L inclusive and 188-A to K 1611 were offered and received in evidence.)

Q. Now, will you state generally, Mr. Rice, whether or not those bids were figured in a similar way to the ones that you have previously described in detail, that is as to whether there was a mill price quoted and a delivered price, and whether or not the mill price was arrived at in some cases by deducting certain figures from the delivered price?

A. The bidders under this letting submitted prices f. o. b. cars contractor's mill and f. o. b. Greenville, Mississippi, either by submitting a figure in the respective places or by an offer to allow a deduction from delivered cost of commercial freight to determine a mill price.

1613 EVERETTE MacINTYRE was recalled as a witness for the Commission further as follows:

Direct Examination (Continued).

Mr. Leisure: Your Honor, I have spoken to the Trial Examiner about trying to work out something that would be satisfactory in regard to offering these abstracts, and here is a stipulation I drew over the noon hour:

Abstracts of figures or statistics, if otherwise properly admissible, may be received in evidence when verified by a witness who himself prepared them, or under whose supervision they were prepared, or who has knowledge they were prepared in the ordinary course of business and not for use in this hearing and without the production of the original data, documents or books from which said abstracts were prepared, provided, however, that if at any time during the hearing any party shall introduce evidence

of errors in any such abstract or of the data upon
1614 which it is based and if upon the introduction of such evidence the parties do not stipulate to correct the abstract as admitted in evidence, said abstract shall be stricken from the record unless or until it shall be legally proven without the benefit of this stipulation.

Examiner Norwood: Is that satisfactory to you, Mr. Wooden?

Mr. Wooden: Yes, Your Honor, I think so, as I understand it. I would like to say this, however, that does not of course preclude the use of the original basic data in addition to the abstracts.

Mr. Leisure: No, no; it is merely a question of saving time.

Examiner Norwood: I think that is very constructive.

Mr. Wooden: And it does not preclude either the calling of other witnesses who may have knowledge of the matters covered by any such abstracts or statistics.

Mr. Leisure: It does not limit you in any way, Mr. Wooden, in that way.

1615 The witness identified Com. Ex. 189 A to H as photostats of papers or of documents furnished to him by Mr. J. F. Neylan, International, New York City, on May 29, 1933. These papers show on their face that they relate to bids received by U. S. Engineer's Office, Vicksburg, Mississippi for furnishing 60,000 barrels of cement, Greenville, Mississippi delivery, the bids being opened November 9, 1932.

Mr. Wooden: I offer those exhibits for the record with the explanatory statement that they relate to the same biddings that are incorporated in Exhibit 187-A.

(The documents were handed to counsel for the re-
1616 spondents.)

Mr. Leisure: May I ask the witness a question?

Examiner Norwood: Certainly.

By Mr. Leisure:

Q. Do you know who R. J. Mahon is?

A. He is an official of the International Cement Corporation, or what was then the International Cement Corporation. Its present title is Lone Star Cement Company.

Q. And Exhibit 189-F, do you know whose handwriting that is, or what it pertains to? (Handing document to the witness.)

A. I can not say as to whose handwriting it is. I can say it is a memorandum in longhand, it is a photostat of a memorandum that was in longhand handwriting and furnished me by Mr. Neylan after I had selected it from papers that he had furnished me.

Mr. Leisure: Have you offered these, Mr. Wooden?

Mr. Wooden: Yes.

Mr. Leisure: Your Honor, as to Exhibit 189-F, it appears to be some kind of a memorandum in longhand writing. There is no date on it. At least until we have had a chance to study it and check it with our clients, to find out if they are responsible for it, I will have to object to it at this time.

Examiner Norwood: That was found in the files, 1617 was it?

The Witness: Yes.

1618 Examiner Norwood: These documents are received as marked, but it is understood that the withdrawal of Exhibit 189-F will be considered if it appears that it does not apply to those transactions, or should not be considered from any other point.

(COM. EX. 189-A to H inclusive was offered and received in evidence.)

Mr. Wooden: Of course, Your Honor, it appears that it does apply to the same transaction, the only question at issue being whose handwriting it is, whos wrote that.

By Mr. Wooden:

Q. Can you tell me, Mr. MacIntyre, what that word is there (indicating)? It is some man's name, apparently. I can not make it out.

A. It appears to be "Mahon."

Q. Who is Mahon?

1619 A. One of the officials of what was then the International Cement Corporation.

Q. And who is this man mentioned in the second line there (indicating)?

A. That is "Birmingham." That is the name of one of the offices of the International Cement Corporation. That is the location of the offices of the International Cement Corporation.

Mr. Wooden: It seems to me, Your Honor, with the showing just made that there can be no doubt that this was a direction to Mr. Mahon of the company.

Examiner Norwood: It has been received in evidence.

Mr. Wooden: I did not understand. There is just one of these that I want to read at this point, Exhibit 189-H. That is a letter from J. W. Johnston, Vice-President and Sales Manager of Lone Star at Birmingham, to H. C. Koch, Vice President, New York Office, dated November 9, 1932, the date of the letting.

"We have just received information that all delivered prices on the Greenville, Mississippi bids received by U. S. Engineers Office at Vicksburg at 11:00 A. M. this morning covering 60,000 barrels of cement were on basis of $2.37 cloth delivered Greenville, Miss. with the exception of
1620 Arkansas *Portland.* Their original bid was on basis of $2.37 but was changed by wire to $2.3017 delivered Greenville. Their mill price originally was 1.67607 but was changed in their wire to 1.755078.

"Marquette bid $2.37 delivered but instead of 1.65 at their mill bid 1.64962.

"Complete tabulation will be forwarded to you promptly upon receipt in this office."

The witness identified Com. Ex. 190 A to K as photostats of papers furnished to him and Mr. M. J. Dunsworth, another attorney-examiner of the Federal Trade Commission, by Mr. Joseph F. Young of Lehigh, Allentown, Pennsylvania, on May 25, 1933. They are photostats of
1621 papers which witness selected from the files of Mr. Young in his Allentown office.

Mr. Wooden: I offer those papers for the record with the statement that they also relate to this bidding or letting of November 9, 1932, on the Greenville, Mississippi, 60,000 barrels.

(The documents were handed to counsel for the respondents.)

Mr. Leisure: May I ask the witness a question or two on these exhibits?

Examiner Norwood: Certainly.

By Mr. Leisure:

Q. Mr. MacIntyre, on Exhibit 190-D, do you know who prepared that?

A. I do not. It was just among the papers I found in the files of Mr. Young.

Q. And with reference to the memorandum marked for identification by the Government 190-B, do you know who prepared that?

A. I do not. It is a photostat of a memorandum I found among the papers in the files of Mr. Young.

Q. Now as to 190-C for identification, it seems to have a signature at the bottom. Do you know whose signature that is?

A. It appears to be Ernest Alley.

Q. Do you know who Ernest Alley is?

1622 A. A representative in the sales force of the Lehigh Portland Cement Company, according to the understanding and information I had received.

Q. He was a salesman for the company?

A. I consider he was more than a salesman.

Q. At least a salesman?

A. He was in the sales force of the Lehigh Portland Cement Company.

Mr. Wooden: We had letters from him go in this morning, I believe?

By Mr. Leisure:

Q. And was this your understanding, when you got this, that he prepared that document?

A. I had no such understanding. It was just among the papers that relate to that transaction and which were found in that project file of the Lehigh Portland Cement Company.

Q. You have never seen Mr. Alley's signature? You do not know whether that is his signature?

A. No, I can not say.

Q. As to 190-G, do you know who prepared that memorandum, the typewritten memorandum?

A. I do not.

Q. And 190-H, do you know who prepared that memorandum?

A. I do not. The only thing I can say about 190-G and 190-H is that they are photostats of the papers that

1623 were found in Mr. Young's files.

1624 (COM. EX. 190-A to K inclusive was offered and received in evidence.)

1625 Mr. Wooden: I want to read just one of these exhibits, 190-E, being a letter from the Birmingham office of the Lehigh Portland Cement Company to Mr. Bowen at the Allentown office, dated November 15, 1932:

"Subject: United States Government, Vicksburg, Mississippi,—

"Dear Sir: It seems that the government used a new set of land grant rates, and apparently Missouri Portland Cement Company is low with their mill cost of 1.619561 which with land grant rate of .681568 makes a total cost to the government of 2.301129. We do not yet have the complete new land grant rate line-up, but expect to have this information by tomorrow and will send it on to you.

"Yours very truly, Birmingham office, R. M. S."

1627 Q. What are the papers marked Commission's Ex-
1628 hibit 191-A and B for identification, Mr. MacIntyre?

A. The papers marked 191-A and B are photostats furnished to me by Mr. George H. Reiter, General Manager of the Cement Institute, on June 22, 1934.

Mr. Wooden: I offer them for the record.

Mr. Leisure: I should like to find out whether this came from the company, or where it came from? Where was Mr. Reiter?

The Witness: He was in room 806 in the Conway Building, 811 West Washington Street, Chicago.

Mr. Leisure: All right.

Examiner Norwood: Received as marked.

(COM. EX. 191-A and B was offered and received in evidence.)

HERBERT H. RICE, was recalled as a witness on behalf of the Commission, and having been previously sworn, testified further as follows:

Direct Examination.

Q. Mr. Rice, what is Commission's Exhibit 192 for identification?

1629 A. This is a photostatic copy of the abstract of bids for furnishing 130,000 barrels of Portland cement to the United States Engineers Office, Memphis, Tennessee. Date of opening, June 7, 1934.

Mr. Wooden: I will offer this for the record, subject to the stipulation which was agreed to a while ago.

Mr. Leisure: No objection.

(COM. EX. 192 was offered and received in evidence.)

Mr. Wooden: I merely observe in passing, your Honor, that 192 and 191-A and B should be considered together.

Examiner Norwood: Very well.

Q. What is the paper marked Exhibit 193 for identification, Mr. Rice?

A. 193 is a photostatic copy of an abstract of bids for furnishing 10,800 barrels of Portland cement in cloth sacks, bids opened June 16, 1934 by the District Engineer at Chicago.

1630 Mr. Wooden: I offer that for the record subject to the stipulation.

Mr. Leisure: No objection.

Examiner Norwood: Received as marked.

(COM. EX. 193 was offered and received in evidence.)

Q. Who were the bidders and what were their bids per barrel f.o.b. Chicago switch track?

A. The Dewey Portland Cement Company, Petoskey Portland Cement Company, Marquette Cement Manufacturing Company, Medusa Portland Cement Company, Lehigh Portland Cement Company, Universal Atlas Cement Company, Alpha Portland Cement Company, Lone Star Cement Company, Indiana Incorporated, Molding Brownell Corporation; bid a price of 2.190874 per barrel f.o.b. Chicago switch track.

Mr. Wooden: I have nothing further with the witness.

Examiner Norwood: Cross examine.

Mr. Leisure: Your Honor, Mr. Smith cannot be here next week, and for that reason I would like him to cross examine now and I will take the witness later.

Cross Examination by Mr. Smith.

Q. Mr. Rice, handing you Exhibit 178 and sub-
1631 ordinate lettered exhibits, as I remember you produced the abstracts of the bids on the Tygart project on the letting under date of January 18, 1935, is that correct? That is 178-A?

A. That is right.

Q. Then you produced the abstract of the bids of the letting of February 7, 1935?

A. Yes.

Q. Did you also produce the abstract of the bids for the letting of February 1, 1935 on the same project?

A. I don't remember any other abstract considered along with them. There is what we call an advance abstract, which is just a tabulation of the bids and any particular items of interest that are sent to the Chief Engineers before this complete abstract with all of the tabulations and calculations can be prepared.

Q. Do not those exhibits show that the first letting was on January 18 at which 17 different bidders bid $1.84; that the second letting was on February 1 at which a lesser number of bidders bid $1.77; and a third letting on February 7 at which a still lesser number of bidders bid $1.70?

A. I am afraid I do not follow you on that. The only two lettings that I recall at this time, is the one that you have there, the long sheet of paper, the narrow sheet, on which the bids were opened January 18th. The second one was advertised under date of February 7 and
1632 the bids were opened on February 16.

Q. There was another letting on February 1st. You have not any papers referring to that here?

A. I do not recall any such opening having been talked about here.

Q. I was asking whether you recall that there was any such letting.

A. I don't recall offhand.

Mr. Smith: Could we have that looked up, Mr. Wooden?

Mr. Wooden: I would be glad to know the facts. It is news to me.

Mr. Smith: What I expect to prove by that is that on January 18, 17 bidders quoted as has already been shown from the abstract, $1.84 and that they were rejected and there was a re-advertisement. Some bidders dropped out on February 1st, and the new price was $1.77. Again there was a rejection, and on February 7 at a re-letting, the government finally reached a price of $1.70.

By Mr. Smith:

Q. Now, will you tell me how many bidders there were at the final letting of $1.70?

A. Eleven.

Q. There were 17 at the first letting?

1633 A. That is right.

Q. So that between those two lettings, 6 bidders were eliminated, or at least dropped out?

A. That is right.

Q. Do you find the Huron Portland Cement Company amongst the bidders in the final letting?

A. No, I do not.

Q. Then the net result of that was, assuming that there was this intervening letting, that the government procured a reduction of the price from $1.84 to $1.70 and 6 bidders withdrew from competition in the meantime?

A. Well, the two abstracts show that that is what happened, yes.

Q. Do you have the bids in connection with that exhibit? Do you recall that they were produced?

A. I do not recall that they were.

Mr. Smith: Mr. Wooden, were the bids produced in connection with Tygart?

Mr. Wooden: Yes, they were. I believe they were numbered and offered and they are upstairs. I will send for them.

Mr. Smith: The Huron bids are the only ones I want.

By Mr. Smith:

1634 Q. Showing you Exhibit 165, which is the abstract of the bids on the Fort Peck project under date of May 10, 1934, did you produce the bids of the several bidders?

A. Mr. Smith, I would not attempt to say offhand whether I did or did not secure these. I remember some of the items I tried to get, I was unable to receive copies of. While Fort Peck was being organized, the Missouri River Division in Kansas City were doing a lot of buying, and in the shuffle back and forth of the records, some of those papers may have been lost. They are all available in the Return Office of the General Accounting Office if you want to see them, and we can probably get copies.

Q. Let me ask that you provide us at some later date with the bids of the Huron Portland Cement Company.

A. On this item?

Q. Yes.

A. Very well.

Q. Those bids were rejected, were they not, Mr. Rice?

A. With just this abstract and no notation on it, I could not say definitely about that.

Q. You have no recollection that would indicate that?

A. I would not want to say by just looking at that abstract, which is four years old.

Q. I am showing you now Exhibit 166. That was the abstract of the letting of June 5th. Do you have the supporting data of the bids of the several companies with that exhibit?

1635 A. I don't remember definitely at this time.

Q. Will you make a note to produce for us the bid of the Huron Portland Cement Company?

A. Yes.

Q. This Exhibit 165 under the Huron caption setting forth their bid, does that indicate to you that they made a bid on destination or delivered price or on mill price?

A. The way this abstract is written up, it would appear that they had quoted some sort of a mill price, but without the benefit of the bids, you cannot follow these abstracts. I do not feel that I am competent to say right here from this one paper. The way they have abstracted all of these cases, the abstracts are not properly prepared when you have the benefit of the bids.

Q. Exactly.

A. So I would rather reserve any definite statement on this until I had the bids.

Q. When the first letting was had on the Fort Peck project, there was included in the invitation to bid, a schedule of land grant rates, as I remember it.

A. That is my recollection.

Q. It was not repeated in the later invitation, but it was set forth in the original invitation?

A. It was in one of them. I don't remember offhand just now which one it was.

1636 Q. Do your files and records indicate as to whether or not the land grant rates were certified to the Quartermaster General of the United States and communicated by him to the several cement companies?

A. No, I never heard that any land grant rates were given to any of the cement companies by the Quartermaster General.

Q. You never heard that?

A. No.

Q. Well then, we are certain of this, that in the first letting, the land grant rates were inserted in the invitation?

A. It is certain that they were inserted in one of them. Whether that was the first one, I don't know.

Q. They were not repeated in the others?

A. They were not repeated in subsequent ones.

Q. But so far as this exhibit as I am now showing you, calling your attention to it, your idea is that the Huron did—I think I quote you correctly—did submit some sort of an f. o. b. mill price? I am trying to quote your words.

A. I am saying that this abstract would have it appear, but that might be a destination cost bid here that has been set forth here. That is the way it looks on this abstract. I say you cannot say that that is an f. o. b. mill price here without the benefit of the bid, because that would be contrary to the usual bids.

1637 Q. You used the words "destination cost bid."

A. That is right.

Q. What is your distinction between that and the delivered bids?

A. A delivered bid is laid down at the government's destination. A destination cost bid is a basis which the cement companies offer to allow the use of government bills of lading by certain deductions which they stipulate.

Q. What would this sort of a bid be,—Portland cement in trainload lots of 2.70.45 per barrel if the government rate from Duluth, Minnesota, named in the government invitation for bids is used in competition described in the preceding paragraph, price f. o. b. cars our mill at Duluth will figure 1.4453112 per barrel in bulk. Would that be an f. o. b. mill price, a destination price or a destination cost price, or a delivered price?

A. From what I got of it while you read it there, it sounds like a destination cost price. They say if a certain allowance is used, or that the price will be so much at the mill.

Q. I am trying to get your definition of destination cost. A delivered price is a flat price named f. o. b. the tracks of destination?

A. That is right. And a destination cost price is a certain price stated from which the particular bidder states the government may deduct the government

1638 freight rate. That is the combination of land grant and commercial, or commercial, or a special rate, whichever is lower. That is generally the way these destination cost offers are worded. That is what a destination cost price is.

Q. But in both of those cases, whether you call

it destination cost or delivered price, the price paid by the government for delivery of the cement at destination would be one certain figure?

A. Oh, you would know what it was, yes. You could figure it out, surely.

Q. Well, I was wondering. In the destination cost price, do you start, we will say, at $2 Fort Peck and figure back to a mill price, or do you start with a mill price and add the railroad rate to determine the $2 at Fort Peck?

A. I can best illlustrate how you figure it by giving you figures on it. We had a case here the other day where the total price of the cement as I recall was $50,150 delivered.

Q. That is right.

A. They bid $45,000 destination cost. They said, "If you want to find out the invoicing price of this cement under this destination cost basis, the invoicing price to the government will be $45,000 less government freight rates, commercial or special, whichever is the lower." Now, when we determine on that basis what we have to pay the mill, we find out what these rates are and
1639 subtract them from the figure that they have inserted over here, and that is what we pay the mill.

Q. But the $45,000 will be the gross?

A. It sums up, when the government buys the cement and gets it to destination, it has cost them $45,000.

Examiner Norwood: What is the $50,150 intended to express?

The Witness: I suspect that that represents the cost of the cement plus cost to the mill for transporting it to destination, which would be all commercial freight.

Examiner Norwood: Just the commercial?

The Witness: Yes.

By Mr. Smith:

Q. Well then, if they offered the cement at $45,000 destination and included nothing else except that single fact, $45,000 for so many barrels of cement at Fort Peck, that would be a delivered price bid?

A. That is what we would pay for the cement.

Q. Then if they put in their bid and said, "$45,000 at Fort Peck but if you wish to find out how much that nets the cement mill, you are to deduct so much for the trans-

portation either land grant or otherwise," then you call that a destination cost bid?

A. We do not call it that. The cement industry 1640 calls it that.

Q. I am not generalizing you into the government; I am referring to you as an individual witness and trying to get your idea.

A. That is what it is called.

Q. That is what it is called?

A. Yes, sir.

Q. But in each instance; the $45,000 would be the ultimate cost to the government?

A. Well, yes, that is what it would cost the government when it was received.

Q. Exactly; that is what I am getting at. What it would cost the government when it is received.

A. That is right.

Examiner Norwood: If the material is shipped on government bill of lading?

Mr. Smith: If the material is shipped on government bill of lading.

The Witness: The way Mr. Smith cited it, as I understand it, they bid $45,000 delivered price, and then also $45,000 and told us that we could deduct this freight. You want to find the mill price?

By Mr. Smith:

Q. Yes.

A. It would not make any difference there which 1641 way you handled it, it would cost the government $45,000.

Examiner Norwood: Yes, but if there were no land grant or no special rates involved, then the delivered price would be the same as the destination cost to the government, wouldn't it?

Mr. Smith: Yes, that is my understanding.

Examiner Norwood: Would it?

The Witness: It would if they quoted the same price both ways.

Mr. Smith: If they quoted the same price both ways, it would be the same; that is obvious.

The Witness: What I am trying to get at is that I have seen some of these abstracts which quoted a slightly lower figure from which to figure this destination cost basis.

By Mr. Smith:

Q. Well, then, an f. o. b. mill price—

Mr. Wooden: (Interposing.) If I may be permitted, I would like to ask a question if we are not going to be very meticulous about the procedure. I would just like to ask whether the witness has taken into account the possibility that there may be a difference in the amount actually paid to the railroad for the land grant transportation when settlement is made, than the amount which
1642 is included in this government destination cost by the cement company?

Mr. Smith: I am a little embarrassed here, your Honor, because the bid should be in evidence that I am referring to, but I thought it illustrated and brought out the difference in these different descriptions. As to what Mr. Wooden has just said, of course it is already in the record that on the Fort Peck bid, the government stated the land grant rates in the bid, so there could be no question there, because I am not assuming that under a clause submitted by a cement concern which says that the government could deduct whichever was lower, and the cement concern had assumed that the land grant rate was 70 cents, but when the government came to pay it it was 65 cents, I am not assuming that the government holds out the 5 cents on the cement industry.

Mr. Wooden: It pays it to the mill.

Mr. Smith: Exactly. It should pay it to the mill. So that an error in the land grant rate, if the government carries out the contract on which it accepts the bid, will have no effect whatever on the transaction.

1643 Examiner Norwood: Go ahead, gentlemen.

Mr. Smith: It seems that photostatic copies of the bids supporting Exhibit 166 were delivered to counsel to check, and I have now a photostatic copy of the Huron bid which I would like to have marked for identification as Respondents' Exhibits 18-A to L.

(The documents referred to were marked for identification "Respondents' Exhibits 18-A to L," inclusive.)

Mr. Smith: Would there be any objection to our offering these at the present time, so that they may go in as a part of the cross-examination on this particular matter?

Mr. Wooden: What is that?

Mr. Smith: This is the Huron bid supporting the abstract. I suppose technically it should be offered as part

of our case, but I was wondering if there is any objection to putting it in now as a part of the cross-examination.

Mr. Wooden: No, that is all right with me.

Examiner Norwood: They may be received as Respondents' Exhibits 18-A to L.

(RESP. EX. 18-A to L, inclusive, was offered and received in evidence.)

Examiner Norwood: That consists of supporting 1644 documents to what Commission's exhibit?

Mr. Smith: 166.

Mr. Wooden: I have no objection, Your Honor, only I would not want them to be putting in documents right along as part of the respondents' case at this time. I might have put that one in myself. I have no objection to it.

Examiner Norwood: It has been received.

By Mr. Smith:

Q. Referring now to the rider attached to Respondents' Exhibit 18-B, I would like to have you read just those first two paragraphs.

A. "United States Government shall determine its cost f.o.b. cars bidder's plant at Duluth, Minnesota, for the purpose of invoicing, if Government bills of lading are used by reducting from the above-mentioned destination cost the Government freight rate shown in the schedule in this proposal applying from Duluth, Minnesota.

"If the Government rate from Duluth, Minnesota, named in the Government invitation for bids is used in the computation described in the preceding paragraph the price f.o.b. cars our mill at Duluth will figure $1.4453112 per barrel in bulk."

Q. That is the clause we were discussing a short while ago, and, as I understand it, that you say is described 1645 as a destination cost bid?

A. That is correct.

Mr. Wooden: Mr. Smith, may I just ask you a question there to clear it up?

Mr. Smith: Yes.

Mr. Wooden: Is it not a fact that the Huron Company had a silo rather than a mill up at Duluth?

Mr. Smith: No, we do not know, in connection with our business, the word "silo". A cement storage and packing plant looks like a large silo, just as a grain warehouse looks like a silo.

Mr. Wooden: But you do not have a mill in Duluth?

Mr. Smith: No, we store and sack, we ship it there in bulk and make it available for delivery.

Mr. Wooden: Is it manufactured at the mill at Alpena and shipped there by water?

Mr. Smith: It is manufactured at Alpena and shipped to Duluth by water, stored, prepared for delivery by sacking, by special machinery, and then is moved out by rail or otherwise from that plant.

By Mr. Smith:

Q. Will you look at the abstract of the letting of June 5, Exhibit 166, and tell me whether or not there are any qualifications there (handing document to the witness)?

1646 There is no notation there, is there, as to any qualification or exception, or otherwise, to the Huron bid?

In other words, it is stated in flat figures, the price, without any other notation?

A. That is right.

Q. Do you recall whether or not all the other bids at that time took exception to two clauses in the invitations to bid, clauses 14 and 25, which required a certain package and facilities for the inspection of cement?

A. I haven't any recollection on that point at all.

Q. And did not your examination of the papers indicate that the failure of the Huron to take exception to those packages, those clauses in the invitation made in the estimate of the Government engineers a difference in price of $1600, that is, the Huron price thereby became $1600 better, or lower than the prices of the other mills?

A. Do you have a copy of the invitation with those clauses in it? There is none attached here.

Q. Here are all the bids.

Mr. Bond: Exhibit 167 is the invitation.

By Mr. Smith:

Q. That is the invitation (handing document to the witness).

A. Did you say paragraph 14?

Q. I think it is 14 and 25, particularly 25. As I recall, it requires a metal container for the inspection of samples.

A. Paragraph 14 is an accommodation for inspectors.

1647 Q. 25 requires a metal container for the inspection of the samples?

A. I have no recollection on paragraph 25 at all.

Q. In any event there is no reference to that in the abstract, is there?

A. No, there is no reference to that at all.

Mr. Smith: I ask to have these marked Respondents' Exhibits 19-A to P.

(The documents referred to were marked for identification "Respondents' Exhibits 19-A to P," inclusive.)

By Mr. Smith:

Q. Did you answer my last question?

A. You asked me if there is any reference here.

Q. There is none?

A. There is none on the samples.

Mr. Smith: Respondents' Exhibit 19-G is the bid of the Marquette Cement Manufacturing Company in connection with the same project. I offer these exhibits, and I refer to Respondents' Exhibit 19-G.

Examiner Norwood: What Commission's exhibit does that relate to?

Mr. Smith: Exhibit 166. It is one of the supporting bids that was delivered at that time.

Examiner Norwood: Do you offer that?

Mr. Smith: I offer that, yes.

1648 Examiner Norwood: It may be received.

(RESP. EX. 19-A to P, inclusive, was offered and received in evidence.)

By Mr. Smith:

Q. Referring to Respondents' Exhibit 19-G, does that refresh you recollection as to whether or not the other bidders on that project took exception to the specification No. 25 in the Government invitation, Huron not excepting thereto, and that later they all withdrew their objection to the specification and then the bids were entertained on the same basis and the letting was then made on the same basis as had been bid by Huron in the beginning

A. No, this does not refresh my memory. I see the official stamp of the Missouri River Division on it, on the photostatic copy. Undoubtedly there was a protest to that.

Q. In your work as a Government official would the contract of a cement company making a sale to the Govern-

ment, independent of public letting, would that go across your desk?

A. Would you mind repeating that question again?

Q. Let me be specific—

Examiner Norwood (interrupting): Read it, Mr. Reporter.

(The question was read by the reporter.)

A. You mean the Government making a purchase
1649 of cement without public advertisement?

By Mr. Smith:

Q. Yes.

A. If it affected the engineering department I would not say it would go across my desk, it would go in the office there somewhere and I probably would know something about it.

Q. Did the contract between the Government, the District Engineer of the United States, Engineers Office, for delivery of 600,000 barrels of Huron cement on the Fort Peck project, the proposal for which was made July 1, 1936, for delivery from July to January, 1937, did that go through your department, do you recall?

A. I do not recall that, no.

Q. These lettings began on May 10, they were dated May 10, June 5, June 10, July 25 and October 16, and on the first day of July,—I may be wrong as to the year—

A. You said 1936.

Q. It was in 1936?

A. I say I understood you to say 1936.

Q. Yes, 1936. That is considered without reference to these others. In 1936 did that contract with the Huron—was that approved by your department, do you recall?

A. I have no recollection of that contract at all.

Mr. Smith: Now can we ask that there be produced at some future convenient date the agreement between
1650 the Government, the proposal being for the District Engineer, United States Engineers Office, Fort Peck, Montana, and being dated July 1, 1936,—I haven't the precise date of the contract, it is either July 1 or 2,—for the sale of 600,000 barrels of Huron cement for use on the Fort Peck Dam at a price of $1.4205096, for shipment in bulk, and $1.6205096 in paper sacks, f.o.b. cars on track at Huron plant, Duluth, Minnesota, for deliveries in stated amounts, beginning from July, 1936, to January, 1937.

By Mr. Smith:

Q. Am I quite clear that you have no memory on that, so that we can not go any further with our investigation on that today?

A. I have no personal recollection on that.

Mr. Smith: Well, that is as far as I can go until we can get the documents in, Your Honor. I will have to reserve the further right of cross-examination when we have the documents.

Mr. Wooden: I think it would be propably more appropriate and orderly if I conducted the redirect on the basis of Mr. Smith's cross.

Examiner Norwood: I think so.

Redirect Examination by Mr. Wooden.

1651 Q. I would like to call your attention in this connection to one of the exhibits gone into on cross-examination, the matter of the inspection and sampling costs. Referring to Exhibit 164-J, the chairman of the code authority notified various concerns on May 31 to the effect: "All sampling and testing costs to be borne by Government with final acceptance or rejection at mill," and according to Exhibit 164-Y and Exhibit 164-Z, the chairman of the code authority, Mr. Raider, asked Mr. MacFadden to take a letter down to Captain Bruton in the War Department, protesting the failure of one or more companies, not named, for violation of the code in that it did not require the Government to pay the cost of sampling and testing.

Now, Mr. Rice, on this matter of the Government destination cost, you took the illustration there of $45,000 as a government estimated cost in one transaction and $50,000, say, as a delivered price, gross delivered price. I understood you to say that no matter what the land grant rate was that the $45,000 destination cost would represent the total destination cost to the Government, no matter what the land grant rate was?

A. That is correct.

Q. But if the actual land grant rate and the actual freight paid on the land grant rate to the railroad differed from that which is included in the Government
1652 destination costs as filed by the bidders it would make a difference, would it not, as to how much the shipper got and how much the railroad got?

A. That is correct.

Q. In other words, the division of the $45,000, in the case you cited as an illustration, would be considerably different between the division that was figured in on the basis of the estimated land grant and which formed a part of the Government destination cost as filed by the bidders?

A. That is correct.

Examiner Norwood: Does that mean that if the land grant rate happened to be less than the mill had estimated that the mill would get the difference?

The Witness: The mill would secure the difference.

By Mr. Wooden:

Q. State whether or not that is wherein you would figure that the Government might be deprived of the benefit of the land grant rate?

A. Well, in any case where the land grant rate or the Government rate figured on that basis is actually less than the mill figures, in getting the destination cost price up the Government is deprived of that portion of the Government land grant rates.

Q. Can you tell in advance just what the actual land grant rate payment to the railroad is? I know in
1653 some cases you put it in your invitations and figured it out on that basis.

A. We have. We figure out all these land grant freight rates before we make an award. We do that as a matter of course. Even in this case the destination cost, where the total cost to the Government is the same no matter what portion the railroad gets and the mill gets, we still figure out the Government rates before we make the award.

Q. As to how they compare with your basis of settlement which is actually made in the general Accounting Office,—do you know how they compare?

A. I do not see that we would have any way of knowing the exact figure that the mills used in trying to calculate or estimate—

Q. (Interrupting): I am not asking that. There has been some testimony here to the effect that the Government itself would not know in advance what the actual basis of settlement with the railroad might be in a particulare case.

A. I see what you mean. In other words, your question goes to whether or not our calculations of land grant rates, or Government freight rates, are the same that the

Comptroller General determines when he pays the railroad bill.

Q. That is exactly what I am getting at.

A. I do not know of any case where the estimate quoted to our District Engineers, or other contracting officers, by the Quartermaster General on Government rates has
1654 differed from that which the Comptroller General authorized in the settlement with the railroad.

Q. Ordinarily you say they are the same?

A. I say they are all the same, the ones that have come to my attention.

1667 Q. Mr. Rice, you mentioned the illustration where out of a total government destination cost of $45,000,
1668 one mill had in their freight as high as $30,000?

A. Well, it was my recollection that that is the way it figured out, that the mill farthest away and the one nearest was what the span was. Of course, those figures were just subject to review.

Q. Therefore, that mill was willing to take $15,000 net at its mill for its cement?

A. Whatever it figured out. There was quite a span there.

Q. Other mills had freight in that $45,000 of—what was the other range? What was the other end?

A. They went down to quite a low figure. I do not recall what it was, but it was less than $10,000.

Q. So that mill wanted, say, about $25,000 for its cement, while another one was willing to take $15,000 for that same cement, wasn't it? Net to each mill?

A. Yes.

Q. Did you lose anything by giving it to the farthest mill as far as the total cost was concerned?

A. No, the total cost was the same.

Q. You did not gain anything, but you did not lose anything either?

A. No, we did not.

Q. What would happen if you always gave your award, in your opinion, to the nearest mill under such circumstances?

A. Well, the mill would get the largest break
1669 down and the railroad would get the smallest cut and the net result would be the same expenditure.

1670 Washington, D. C.,
Tuesday, January 11, 1938.

1672 JOSEPH W. POWERS, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. MacIntyre.

I am at present an attorney-examiner for the Federal Trade Commission and have been for three and a half years. In connection with taht work I have had occasion to conduct an investigation relating to the Ce-
1673 ment Industry and in that connection I called upon and examined the files in the offices of Mr. George H. Reiter of The Cement Institute.

The witness identified Com. Ex. 194-A and B as photostatic copies of correspondence obtained from George H. Reiter, General Manager of the Cement In-
1674 stitute, on November 18, 1936; Com. Ex. 195-A to M as papers obtained from Mr. Reiter on November 25, 1936. All these papers were from the files of the Cement Institute; Com. Ex. 196-A to Y as papers obtained from Mr. Reiter on November 25, 1936; Com. Ex. 197-A to AA as papers obtained from Mr. Reiter on November 25, 1936; Com. Ex. 198-A and B as papers obtained from Mr. Reiter on November 25, 1936; Com. Ex. 199-A to F as papers obtained from Mr. Reiter on November 25, 1936; Com. Ex. 200 as papers obtained from Mr. Reiter on November 25, 1936; Com. Ex. 201-A to G as papers obtained from Mr. Reiter on November 18, 1936; Com. Ex. 202-A to EE as papers obtained from Mr. Reiter on November 18, 1936; Com. Ex. 203 A to N as papers obtained from Mr. Reiter on November 25, 1936; Com. Ex. 204-A to N as papers
1675 obtained from Mr. Reiter on November 18, 1936.

1676 CRESTON A. GIBLIN, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. MacIntyre.

I am an Attorney Examiner for the Federal Trade Commission and have been so engaged for two and a half years. In connection with that work I have had occasion to conduct investigations of the cement industry and have had occasion to call at the offices of Mr. H. B. Robeson of the Nazareth Cement Company.

The witness identified Com. Exs. 205-A to F, 206-A to SSS, 207-A to R, 208, 209, 210-A to N, 211-A to E, 212-A to C, 213-A to K, 214-A and B, 214-D and E, 215-A and B, 216-A and B, 217-A to CC, 218-A and B, 219, and 220-A to C

1677 as photosatic copies of the correspondence obtained from the files of Nazareth and given to him by Mr. H. B. Robeson of that concern. They were obtained under date of November 16, 1936. The witness thinks they were all obtained on the same date "(examining papers)". He said that Com. Ex. 214-A and B and Com. Ex. 214-D and E were not obtained from Mr. Robeson but were obtained from Mr. T. O. Breverton, sales manager of Allentown Portland Cement Company, its Philadelphia, Pennsylvania office. They were obtained from the files of the Allen-

1678 town Portland Cement Company at Philadelphia on November 20, 1936. Com. Ex. 215-A and B were obtained on November 20, 1936 from Mr. T. O. Breverton, sales manager of the Allentown Portland Cement Company, and extracted from the files of the sales office of that concern at Philadelphia. All of the balance were obtained from Mr. Robeson's office at the Nazareth Cement Company, located at Nazareth, Pennsylvania.

The witness identified Com. Exs. 221-A to TT, 222-A to C, 223-A to I, 224-A and B, 225-A to D, 226-A and B, 227-A to D, 228-A to M, 229, 230-A to N, and 231-A to C as photostat copies of correspondence and other material extracted from the files of Nazareth and obtained in the course of an interview with Mr. H. B. Robeson of Nazareth on November 16, 1936. The witness had occasion to call on Mr. Weibel of the Allentown Portland Cement Company

in connection with his investigation of the cement in-
1679 dustry.

The witness identified Com. Exs. 232, 233-A to F, 234-A and B, 235-A to I, 236-A and B, and 237-A to E as photostat copies of material extracted from the files of the main office of the Allentown Portland Cement Company at Allentown, Pennsylvania, and they were obtained by him in the course of an interview with Mr. Weibel at the Allentown Portland Cement Company on November 17, 1936. The Allentown Portland Cement Company's offices are really located at Catasauqua, Pennsylvania. The location of the offices from which the witness obtained this material is at Catasauqua instead of Allentown. They also have as sales office in Philadelphia, of which he spoke a while ago. During his investigation of the cement industry he had occasion to call on Mr. Elliott of Whitehall in Philadelpia.

1680 The witness identified Com. Exs. 238-A to I, 239-A to C, 240-A to E, 241-A to J, 242-A to G, 243, 244-A and B, 245, 246-A and B, 247-A to C, 248-A to Q, 249-A and B, and 250-A and B as photostats of material extracted from the files of Whitehall, the offices of which are located in the Fidelity-Philadelphia Building—he thinks that is the name of it,—and were obtained by him in the course of an interview with Mr. Elliott of Whitehall on November 21, 1936 at Philadelphia, Pennsylvania. During the course of his investigation of the cement industry he had occasion to call on Mr. Peters of Giant.

1681 *Cross Examination by Mr. Leisure.*

The witness said that the files were handed to him and he was told to select any material that he wished from those files. They were brought back to Washington by him, his initials placed on each piece of the material sent down to the Photostat Division, and returned to him and checked by him to see that the photostats of each piece of material were made and then the originals were returned to the parties. The photostats are the ones that the witness produced.

EDWARD T. WIDMANN, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. MacIntyre.

I am an attorney examiner for the Federal Trade Commission and have been so engaged for approximately four years. In connection with that work I have had occasion to conduct investigations of the Cement Industry and
1682 I have had occasion to call on Mr. Peters of the Giant Portland Cement Company in Philadelphia. I have also had occasion to call upon and conduct an investigation at the offices of Mr. James H. Ackerman of the Lawrence Portland Cement Company.

The witness identified Com. Exs. 251, 252-A to DDD, 253-A and B, 254-A and B, 255-A to F, 256 and 257-A to G as photostats and in some cases copies and in other cases original material which he obtained from Mr. Peters of Giant in Philadelpia on November 24, 1936. The
1683-1684 typewritten copies were furnished to witness by Mr. Peter of Giant. The witness examined the file and made certain selection from the file. They were documents which Mr. Peters did not wish to release for some reason or other, and it was satisfactory that he furnished witness with typewritten copies of those documents.
1685 The witness is able to state for the record that the photostats and typewritten copies about which he has been talking were all secured from Mr. Peters of Giant; Com. Exs. 258-A to F, 259-A to F, 260-A and B, 261, 262-A to F, 263-A to O, 264-A to D, 265-A to E, 266-A and B, 267-A and B, 268-A to F, 269-A to E, 270-A to J, 271, 272-A to J, and 273 as "The majority of these are photostats of correspondence and other material selected from the files of the Lawrence Portland Cement Company". The other material is original and was furnished to witness by Mr. Ackerman, sales manager of Lawrence, on November 18, 1936. There are a few copies of correspondence and other material which Mr. Ackerman had made and which he furnished to witness. All of the material about which "we have been talking", whether photostats of originals or typewritten, were in fact secured by witness from Mr. Ackerman. During the conduct of his investigation of the ce-

ment industry, witness had occasion to call upon and interview and conduct an investigation at the offices of Mr. Neylan, of Lone Star, New York.

1686 The witness identified Com. Exs. 274-A to I, 275, 276-A to D, 277-QQ, 278-A to F, 279-A and B, 280-A and B, 281, 282-A to F, 283, 284-A to V, 285-A to P, 286-A to HH, 287-A to D, 288, 289-A to M, 290-A to F, 291-A and B, and 292-A and B as photostats of correspondence and other documents which he obtained from the files of Lone Star. This group also contains some originals of correspondence and other materials which he extracted from the files of Lone Star and which were furnished to him by Mr. John F. Neylan, assistant sales manager of that company. The group also contains typewritten copies of letters, correspondence and other material which Mr. Neylan had made for witness and which he furnished to him. That

1687 "group" begins with number "274-A" and the last one is "292-B". These were obtained on November 20, 1936. All of the material in the group between 274-A and 292-B, inclusive, was obtained by witness from Mr. Neylan, whether represented by photostats or typewritten copies. In other words, the photostats are photostats of material furnished to witness, and those that are not photostats are originals furnished to him by Mr. Neylan, or copies handed to him by Mr. Neylan. Therefore, all the material represents material selected from Mr. Neylan's file and which Mr. Neylan furnished to witness either as originals or to have photostats made.

1688 TRAVIS T. BROWN, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Paulson.

I am employed with the Treasury Department. I was formerly employed with the Federal Trade Commission for approximately one and a half years terminating on June 15, 1937. With the Federal Trade Commission I was an attorney examiner on the staff of Mr. Horton, the chief examiner. In that period of service with the Commission I was assigned to investigate the cement industry and I

called on the North American Cement Corporation, the Coplay Manufacturing Company, the Vulcanite Portland Company and the Hercules Cement Company.

1689 The witness identified Com. Exs. 293, 294-A and B, 295-A to E, 296-A to K, 297, 298-A to D, 299-A and B, 300-A and B, 301, 302-A and B, 303-A to D, 304-A to
1690 T, 305 and 306-A to D as copies of correspondence he received from Mr. Twamley of Coplay in November 1936. The witness knows he received them in November 1936 because he made a notation on each piece of correspondence immediately after he selected it from the files, and Mr. Twamley permitted him to bring them to Washington to be photostated. Mr. Twamley is an officer with the corporation, "he told me". The witness does not remember his exact title. They were selected on November 16, 1936, to be exact.

The witness identified Com. Exs. 307, 308-A to F, 309, 310, 311-A to E, 312-A to G, 313-A to K, 314-A to Z, 315, 316-A to G, 317-A to N, and 318-A to E as photo-
1691 static copies of correspondence he received from Mr. T. J. Harte, an officer of North American, on November 19, 1936. Mr. Harte is an officer of North American. The witness does not recall his exact position. He knows that he received them from Mr. Harte because immediately after Mr. Harte permitted him to take these from the files of North American, and the witness made an exhibit, the witness assigned each one an exhibit number and noted it on the document Mr. Harte gave to him. Then, after bringing them down to Washington and having them photostated, the witness compared the originals with the photostatic copies and made the notation on the photostatic copies.

The witness identified Com. Ex. 319-A as a photostatic copy of a letter he received from Mr. Twamley of Coplay on November 16, 1936; Com. Ex. 319-B, C and D as photostatic copies of correspondence he received from Mr. T. J. Harte of North American on November 19, 1936;
1692 Com. Ex. 320-A to E as photostatic copies of correspondence received from J. F. Twamley of Coplay on November 16, 1936; Com. Ex. 321 as a photostatic copy of a letter received from J. F. Twamley of Coplay on November 16, 1936; Com. Ex. 322-A to E as photostatic copies of correspondence received from J. F. Twamley of Coplay on November 16, 1936; Com. Ex. 323 as a photo-

static copy of a letter received from Mr. Twamley of Coplay on November 16, 1936. All of these came from
1693 the company's files; Com. Ex. 324-A to C as a photosatics copy of a letter received from Mr. T. J. Harte of North American on November 19, 1936; Com. Ex. 325-A and B as photostatic copies of two letters received from Mr. J. F. Twamley of Coplay on November 16, 1936; Com. Ex. 326 as a photostatic copy of a telegram received from J. F. Twamley of Coplay on November 16, 1936; Com. Ex. 327-A and B as a photostatic copy of a letter received from Mr. J. F. Twamley on November 16, 1936; Com. Ex. 328-A to U as typewritten copies,
1694 price lists and other written documents received from Mr. T. G. Barr of Vulcanite on November 20,
1695 1936. Mr. Barr is an officer in the Vulcanite Portland Cement Company. Those typewritten copies were handed to the witness by Mr. Barr or under his direction from the files of his company.

1696 HERBERT H. RICE, was recalled as a witness on behalf of the Commission, having been previously sworn, testified further as follows:

The Witness: During the cross examination by Mr. Smith and subsequent questions by Mr. Wooden, we were discussing freight rates, and I had in mind the proportions rather than the exact figures, and I believe I said $15,000 to $30,000 on some cement bought for Vicksburg. The land grant freight in that case actually ranged from $9,335 to $17,715.

Examiner Howard: Can you identify that with the page of the record?

The Witness: I can identify it if I get the record.

Mr. Leisure: Which bid is that?

The Witness: The Vicksburg opening of bids on October 1, 1937.

Mr. Leisure: Number 11,063,869?

The Witness: That is right. It is the one that we were discussing as to $45,000 worth of cement.

1697 By Mr. Wooden:

Q. And the gross delivered bid was what?

A. The delivered bids were all $50,175.

Mr. Leisure: What is the exhibit number on that paper that you are reading from?

The Witness: That is not the exhibit. It is our file in the War Department. There was an exhibit, a copy of this in the file somewhere.

By Mr. Wooden:

Q. So in that case, as I understand it, the freight of one bidder was a little over $9,000, leaving an amount realized for cement of some—is it $36,000?

A. Well, I could read these figures. The freight of the bidder having the lowest land grant amount was $9,335.61, making a net cost of the cement $35,664.39. That is the net receipt to the mill. The bidder having the highest freight had a land grant rate of $17,715.24 with $27,284.76 going to the mill.

Q. Mr. Smith on cross examination asked you why you did not divide the business between bidders when their bids were identical. Is there any policy or ruling of any official which prevents you from doing that?

A. The only reason we would divide the business would be if that advertisement was by lot, say 200,000 or 300,000 barrels to a lot and the delivery requirements 1698 were such that no one mill could reasonably be expected to keep up with the rate that we would have to have the cement. After leaving here, I thought of a decision which I think answers Mr. Smith's question, which would generally prohibit our splitting items.

The Comptroller General under date of August 8, 1934, Decision A-567210 stated:

"Any procedure of splitting the award between two or more bidders submitting identical bids under the supposed protection of a Code of Fair Competition would encourage identical bids for the reasons that the bidders under such a procedure of splitting awards would be assured of some of the government's business regardless of the merits of their products and prices, instead of all the contracts or none of, the bases of the merits of their product and prices."

Mr. Leisure: What is the date of that decision?

The Witness: August 8, 1934.

By Mr. Wooden:

Q. Did you ever put up to the Comptroller General the permissibility of your awarding bids by lot in cases of identical bids?

A. No, sir. The reason we do it, we are required by Army regulations to make the award by lot on the receipt of tie bids if there is no other basis for the award.

Q. Do you know of any Comptroller General's ruling on that question?

1699 A. He touched on that question in this decision to the Administrator of the Federal Emergency Administration of Public Works No. A-54,083 on March 1, 1934:

"Where there are several or more than one low bid in the same amount, in such a case and there is no choice as to quality among the several offerings of the low bidders submitting identical bids as to price, nor any other determining factor such as difference in transportation costs of delivery, there appears to be no legal objection to the selection of one of the bids by drawing lots for the awarding of the contract."

I did not look up that particular point, but I just happened to find this when I was looking for this other decision.

Q. Mr. Smith on cross examination asked you certain questions about a contract of the Huron Company with your Department for furnishing cement to Fort Peck?

A. That is right.

Q. Was there such a contract?

A. There was. There is a contract, and I have it now. It is dated June 30, 1936, No. W-631 ENG-828, with the Huron Portland Cement Company for furnishing 600,000 barrels of Portland cement in bulk and 5,000 barrels in paper bags.

Q. Will you describe how that contract came to be entered into? What the events and circumstances were?

1700 Mr. Leisure: Cannot we get that contract marked? I don't believe it is in evidence.

The Witness: That is an official contract.

Mr. Leisure: I will consent to the original being withdrawn and a photostat being put in.

The Witness: I will submit you a photostat.

Mr. Wooden: I ask to have the contract marked Commission's exhibit for identification No. 329-A to Z.

(The contract referred to was marked "Commission's Exhibit 329-A to Z for identification.")

By Mr. Wooden:

Q. The contract with the Huron Company to which you have been referring, is that now marked Commission's Exhibit for identification 329-A to Z?

A. That is right.

Mr. Wooden: Your Honor, I would like to offer the contract subject to a photostatic copy being substituted for it.

(COM. EX. 329-A to Z was offered and received in evidence.)

Q. Now, will you answer the other question, Mr. Rice, as to the events and circumstances that led up to the negotiation of that contract?

1701 A. The bids received by the Fort Peck District on June 10, 1936 for furnishing 605,000 barrels of cement were considered excessive, and by a telegram to the Chief of Engineers of June 10th from the Division Engineer who at that time was in Fort Peck, I quote:

"Bids opened 605,000 barrels Fort Peck today are approximately 30 cents higher than present contract stop all bids rejected as excessive."

Mr. Leisure: May I ask if that file of correspondence and telegrams is accessible to us, or do you consider that a secret file?

The Witness: This telegram?

Mr. Leisure: That file? Is that accessible to us? Can we read the file?

The Witness: You can read the file or anything that I am reading from, or I will furnish you with photostatic copies.

Mr. Leisure: I am interested, and we want to look at that file that you have read this one telegram from, whether you contend that that is a secret file which we cannot see, or is something that our representatives can look at and read the file?

The Witness: I am afraid I would not be able to answer that question. Normally these files are not let out of the office, but since Mr. Smith raised the question,

1702 I felt that I should bring these over to explain how the award was made to the Huron Company.

By Mr. Wooden:

Q. Does the file contain other matters?

A. This file contains probably all matters on cement for Fort Peck. It does not only pertain to this one con-

tract or one transaction, but it is made up of what we would term the whole file for Fort Peck.

1703 Examiner Norwood: That must be open to inspection if you refresh your memory from it.

Mr. Leisure: Is that in the War Department? Who is stated on that file?

The Witness: The Chief of Engineers.

By Mr. Wooden:

Q. Go ahead with your statement.

A. The bids were rejected due to the reason stated, and then the following telegram was received on June 27, 1936, from the Division Engineer: "Following telegram received from District Engineer for check: 'Refer rejected bids invitation 630 request authority to purchase open market and enter emergency contract 605,000 barrels cement from Huron Cement Company Detroit, Michigan, shipping from Duluth stop Total estimated cost delivered Wiota on Government bill of lading $1,634,500 less cash discount 10 cents per barrel 15 days stop Payment from Rivers and Harbors.' This is the price agreed upon by Division Engineer under verbal authority your office stop Recommend confirmation by wire direct to District Engineer to enter into emergency contract after open market agreement stop Authorized by Army Regulation 5-240 Paragraph 48 of H."

Q. Can you say how the prices in the Huron contract compared with those in the bids? First let me ask, was Huron one of the bidders on that occasion?

1704 A. No, Huron did not bid.

Q. Now how did the prices in the Huron contract compare with the other prices in the bids?

A. I will have to do a little adding here. I think it might be well to read these prices and let them speak for themselves.

Q. All right.

A. The delivered cost under the open market procurement was $1,634,500. That is for the total, 605,000 barrels. This abstract was broken down into three items. The unit price submitted for the 600,000 barrels in bulk was 2.9385144. That price was submitted by the Universal Atlas under two bids, and Lehigh Portland and Pennsylvania Dixie Cement Corporation. The Three Forks Portland Cement Company submitted a price of $1.95 for 300,-

000 barrels in bulk and $2.15 in paper bags. The Universal Atlas—

Q. (Interrupting) You are giving us a lot of figures there. Of course, that abstract is already in evidence, I believe, but I want to get a comparison on the same basis of the Huron contract bid with the price in the abstract.

A. Well, we would have to do a little adding here.

Q. All right, do a little calculating.

A. Making some quick calculations here, which I think are reasonably correct, assuming that the Three Forks Portland Cement Company had been willing to sell
1705 600,000 instead of just 305,000 barrels of cement, their price would have been $1,723,294. Now, on the basis of 605,000 barrels for the other bidders the price was $1,810,391.86. That is the cost at Fort Peck.

Q. Now, as to that $1.95 price for Three Forks, was that a mill price?

A. Yes, that was.

Q. Now what did the Huron contract price figure out, on the basis as to the other figures that you have given?

A. You mean the difference? The total cost at Fort Peck was $1,634,500.

Q. Can you figure out, while you have those figures before you, what the differences amounted to per barrel between the Huron contract price and the bidder's price? Put them both on the same basis.

A. About approximately $2.70 net a barrel delivered, about 23 cents, 23 and a fraction cents less under the Huron bid than under these others.

Q. In other words, if the bids were 30 cents higher than the previous contract prices then Huron's contract price was only about 7 cents higher, is that right?

A. About 7 cents higher than what it had been from these telegrams.

Q. Now you are figuring in both cases, I understand, the destination cost to the Government?

1706 A. Yes. The price at Three Forks I said was $1.95, but in calculating it I have taken the total, which includes 85.54 cents land grant, making a total of $856,647 for 300,000.

Q. Where was the Huron cement, under contract, to be delivered?

A. F. o. b. cars at Duluth, Minnesota.

Q. And what was the price at that point?

A. Portland cement in bulk $1.4205096.

Q. Are you through with your answer, Mr. Rice?

A. I was going to add: Then for the small lot of paper bags it was $1.6205096 per barrel, subject to 10 cents per barrel discount.

Mr. Wooden: I am informed that the last exhibit is 329-A to Z instead of 329-A to AA.

Examiner Norwood: Correct that.

Mr. Zimmerman: Will you correct it on the record so we will not have to insert it?

Examiner Norwood: Exhibit 329-A to Z.

Mr. Wooden: It is just one complete alphabet. Change it on the exhibit before it is photostated.

(The exhibit was corrected accordingly.)

By Mr. Wooden:

Q. Mr. Rice, Mr. Smith asked you several questions about bidders making erroneous calculations, pos-
1707 sibly erroneous calculations of the land grant rate in figuring their Government destination costs. Would you or would you not say that wherever the delivered bids, or the Government destination costs is identical and errors occur in the land grant rate that the errors are also identical?

Mr. Leisure: I object to the question as leading. The witness is an attorney and knows the facts. If the subject-matter is directed to his attention he should be able to answer it without having the answer indicated in the question.

Examiner Norwood: The record already shows whether or not they are identical, does it not?

Mr. Wooden: It does not show yet whether the land grant calculations are actually identical. That is what the question is directed to.

Examiner Norwood: He may answer that if he knows. Objection overruled.

A. The only thing I know is that there has been—that the abstract shows that the—

Mr. Leisure (interrupting): Now I object to anything that he does not know about. Your Honor limited the question as to what he knows. I think the question is leading anyway. It calls for a conclusion. He should be able to tell without giving a conclusion. He should not give a conclusion when he does not even know.

1708 The Witness: I would say that from my experience with these bids they would indicate that the same errors had been made by all bidders, if in facts errors had been made.

1709 Mr. Wooden: I have nothing further of the witness at this time.

Examiner Norwood: Cross-examine.

Cross-Examination by Mr. Leisure.

Q. Mr. Rice, when you testified on direct you said you were one of the attorneys in the War Department?

A. Yes.

Q. Does that mean that you are a counselor at law?

A. That is right.

Q. You are admitted to the Bar? You are a lawyer?

A. Yes, sir.

Q. Now, when a public letting is about to be had at some distant point, just how does that come to the attention of a lawyer in the Department? Would you mind explaining the procedure so we will have the picture of how those things are done?

A. Well, normally, the bids are solicited in the usual public advertisement and the bids are opened by the officer in the field who is charged with the responsibility of making the contract. Within certain limitations the officers in the field make the awards of the contracts and there is no reference to the Chief of Engineers, but if there is a protest with regard to the responsibility or efficiency of the organization that a contractor may have, or his

1710 ability to perform the contract, the papers are referred to the Chief of Engineers and there is a thorough investigation of all of the facts concerning which there has been a protest. On other items the bids are opened in the field and they are abstracted, and all the original bids and abstracts, with correspondence, is forwarded to the office of the Chief of Engineers and there it is gone over before any disposition as to award is made at all. I do not know whether that answers it.

Q. It does. Is that done in every case or is that done only where the bids are protested?

A. We get abstracts on practically all items except subsistence supplies. We know what is going on. We have reports of contracts in force, we know when awards are

made. These figures here (indicating) are taken from those, showing the percentage of completion, certain payments are put on the book, and so forth.

Q. That of course does not apply just to cement, that applies to all purchases by the War Department on a public letting?

A. As a matter of fact, cement is one of the few items that, without regard to amount, our field District Engineers are authorized to buy locally, except when they want to refer the matter, when it becomes necessary under protest.

1711 Q. In those cases, are the abstracts and the bids forwarded to Washington, or are they retained in the local office?

A. They are forwarded to the office of the Chief of Engineers, if there is occasion for a decision.

Q. But otherwise they are not?

A. Otherwise they would not be. If the award can be made to the satisfaction of all concerned and it is perfectly orderly procedure, we would not get the bids, we would get the abstract.

Q. Would you get the abstract?

A. I think we would get an abstract. My recollection on that is that we get abstracts on all of them.

Q. Where there is no protest, would they just come here for filing, or would there be anything for the attorneys to do in the Department with respect to the abstracts?

A. I think they would just come for filing, if there is really no action. It might just be to observe how prices are running, or something of that sort, but it would be just for filing as a matter of record.

Q. Approximately how many attorneys are there that are doing the kind of work that you are doing in the War Department?

A. Well, it might give you a better picture the way our immediate office is set up. We have in what is known as the Finance Division, we have a contract section which has five attorneys. Each one of those has different

1712 assignments of duties.

Q. Is that the section you are in, the Finance?

A. That is right.

Q. You are one of those five lawyers?

A. Yes.

Q. And each one has a separate assignment?

A. Separate assignment. A certain classification of work.

Q. What are your regular duties?

A. I have been assigned to all matters of protest and award and procurement methods and things of that sort that deal directly with the purchasing.

Q. And how long have you been doing work under that particular assignment?

A. Well, practically since I was appointed to the office in May, 1929. In fact, the office grew from two attorneys at that time to its present status.

Q. Now, on the bids that Mr. Wooden offered here and you brought here, I assume from the War Department, what method was used in selecting those? You did not bring all the bids that have been made during your entire term of office?

A. No.

Q. You made certain selections?

A. We tried to make—I sent for those myself and I know how they were secured. We went over the records and tried to ascertain what districts had bought the 1713 most cement in the past few years, and what we did not have a record of, we asked for generally, and those that we knew by number, invitation number, we asked for specifically. I think our letter probably asked for the District Engineer to send us photostatic copies of the bids and abstracts for certain invitations in their large purchases of cement.

Q. After you got that, did you make the selection as to the ones that you have produced here?

A. Well, all that I sent for, I sent over to the Commission.

Q. And the Commission selected the ones that were to be used here, and returned the others to you; is that the way they got it?

A. I don't know how they were reduced from the quantity that I identified. I rather think they have all been used that I sent over.

Q. You think that during the period of time that you have been in office, that all of the large purchases of cement have been offered in evidence here?

A. All that I sent for. And I only sent to those districts like Fort Peck and Bonneville and Conchas Dam,

places where I knew they had bought a large amount of cement and that their experience with purchases of cement would be a fair example of the Department as a whole.

Q. And these abstracts that were offered in evidence, the photostat, is that the complete abstract in every
1714 instance or are there occasions where the abstract carries over to another page?

A. Those that I noticed were either complete in one page or they had attached to it the collateral information, such as certain notations that were in the various bids, conditions and all. I think they are all there, whether they are on one page or follow over.

Q. In every instance, we have a photostat of the complete abstract whatever it is?

A. I feel certain that you have.

1715 Q. Mr. Rice, when we adjourned we were going over the internal working of your own office, as to your bids. Who is it in that department that makes up the invitations for bids?

A. Most of the invitations for bids are prepared in the district office. Any corrections or amendments from time to time are, of course, generally passed upon by the Chief of Engineers.

Q. Now on the redirect of Mr. Wooden that was just conducted in regard to how the successful bidder was determined, I think you said that they were determined by lot. I notice in the one that you read from, which is Exhibit 157, that that was not by lot.

A. That Vicksburg opening that we have been discussing, correcting the prices on.

Q. Will you explain that?

1716 A. Yes, sir. The award in that case was made to the Consolidated Cement Corporation on the theory that the award to that company would result in the lowest direct payment to the mill, which would most closely resemble an f. o. b. mill bid. I think some such procedure was described in paragraph 6 of that invitation.

Q. Now, in the other case that you were questioned about, I believe it is Exhibit 329, the Huron contract, how did you happen to select Huron? The other bids were not accepted. How was Huron selected? Was it by lot?

A. No, in that case the other bids were rejected because the price was believed to be excessive, and informal negotiation was conducted with the various available cement

mills to determine which one, if any, would give us a little better price.

Q. What mills were those negotiations carried on with, do you know?

A. Well, I could not say definitely. I suspect if the policy were followed that is usually followed—

Q. (Interposing.) Just if you know whom that was discussed with.

A. No. I think the District Engineer undoubtedly—I was going to say the policy would be to see what mills usually submitted bids, if there were not any that did not submit bids, and to circularize all available mills to see
1717 just what price they would quote.

Q. Do you know whether there was a circularization of bids in that instance?

A. You mean the informal bids?

Q. Do you know whether or not any negotiations were carried on, any circulars sent out, as you have suggested in this case?

A. I do not think there was any formal circular. Probably those that would have communicated would be either by telephone, telegraph or by letter, as to what price they would bid.

Q. Do you know whether or not that was done in this case?

A. Do you want me to state my reason for that supposition?

Q. Yes.

A. The fact that Huron did not bid originally, somebody would have to call their attention to the fact that the bids had been received, no award made, were they in the position to quote a price. That is what makes me think there was some solicitation. Whether formal or informal I do not know.

Q. Now, is that the bid that you suggested was an emergency, 605,000 barrels?

A. That is right. That is what we call an emergency contract.

Examiner Norwood: That was an open market purchase, was it not?

The Witness: Yes, sir, that is right.

1718 By Mr. Leisure:

Q. Do you know anything about the particular job, if 50,000 barrels would have sufficed in an emergency of that kind? Do you know anything about the particular project?

A. Well, I think the contract—I do not believe I have it with me now, we are having it photostated—the contract would probably show what the delivery schedule was. I do not know whether 50,000 would suffice or not. The reason for that is if the 600,000 in bulk was divided into two lots of 300,000 each it would look like it was contemplated that an award would be made with two separate concerns with large delivery requirements.

Q. Now, taking up a different subject, Mr. Rice, on the control clauses. The respondents had a contract clause, which was that the sticker which you pointed out?

A. Yes.

Q. And the Government also used a form of control clauses, did it not?

A. I do not know just what you refer to.

Q. Let me see if I can refresh your recollection. You mentioned this morning, I think, the Vicksburg bid, your No. 11063869, I think that is Government Exhibit 157. Let me show you its invitation to bid and acceptance 11063869, paragraph 3 on page 2. Would you just read that to the Examiner?

1719 A. Paragraph 6, did you say?

Q. Yes, on page 2.

A. "In the event a bidder fails to quote a price f. o. b. shipping point or shipping points the Government reserves the right to determine the bidder's price f. o. b. shipping point or shipping points by deducting from the bidder's price f. o. b. destination the cost of transportation at commercial freight rates from shipping point or shipping points to destination and to make award at the bidder's price f. o. b. shipping point or shipping points so determined. Shipments in such cases to be made on Government bills of lading with transportation costs from shipping point or shipping points to destination payable by the Government. Freight rates in effect on the date of opening of bids as ascertained by the contracting officer from the Quartermaster General U. S. Army at Washington, D. C., will be used in canvassing the bids."

Q. Now, will you read the respondent's control clause with respect to the same bid? The minimum bid of that particular company, of that respondent, of course, is what I mean.

A. "The U. S. Government shall determine its costs f. o. b. cars Nashville, Tennessee, for invoicing purposes on shipments moving on U. S. Government bills of lading to

the above named destination only by subtracting from the above-mentioned destination cost to the United States Government the land grant rate as determined by the
1720 U. S. Government, as being applicable from Nashville, Tennessee, to said destination, or the actual commercial freight rate for special U. S. Government rate applicable from Nashville, Tennessee, to the destination named, whichever is the lowest."

Q. What company was the bidder in that case?

A. Hermitage Portland Cement.

1721 Q. In the first control clause that you read, it provides for the deduction by the government of the commercial rate, does it not?

A. That is right.

Q. It says, "The government reserves the right to determine the bidder's price f. o. b. by deducting commercial freight rate," isn't that so?

A. That is correct.

Examiner Norwood: That is strictly a rule which is applied to govern the award, isn't it?

Mr. Leisure: It is the rule that governs that particular bid, if your Honor please, if it is accepted.

Examiner Norwood: By that rule, it determines which is the lowest bid.

Mr. Leisure: The purpose is to allow, as I understand, your Honor, to allow the government to deduct the commercial rate.

Examiner Norwood: That is stated to be a rule which is applied in determining which bid is the lowest; isn't it?

Mr. Leisure: No, it has nothing to do with making up the lowest bid, as I understand it.

Examiner Norwood: Let the witness state it.

The Witness: I think, in order to get a complete pic-
ture of this whole thing, you have got to read the
1722 first sub-paragraph of paragraph 6. If you have no objection, I would like to read it.

"Award will be made on the basis of the lowest cost to the government delivered f. o. b. Greenville, Mississippi. For the purpose of comparing bids, transportation costs at the government freight rate from point of shipment to Greenville, Mississippi, will be added to all prices quoted f. o. b. contractor's shipping point, except that in cases of shipment from the point from which special land grant rates to destination are not available to the government,

bidders may propose to equalize rates with land grant rates available to the government at destination."

Now, I think when you read those two paragraphs together, it is clearly indicated on there that the purpose of the wording in that paragraph which I first read with regard to the deduction of commercial rates, that that is the procedure that the government will follow in making the award if the bidder does not give an f. o. b. shipping point bid. And that is the procedure we followed in making this award to the Consolidated people.

By Mr. Leisure:

Q. And that gives the government the right to deduct the commercial rate, and it so states, does it not?

A. It is a statement there that that is the basis
1723 upon which we are going to determine who will get the award, by determining who is low at the mill on that basis.

Q. So it would be used in that way in determining who got the award?

A. Who got the award, yes.

Q. So it would be figured in the final cost, would it not, the deduction of the commercial rate, or at least a clause giving the government the right to do that?

A. I do not see that there would be any difference in the final cost whether this paragraph was in or out, as far as that is concerned. When you add the freight to it, the sum and total is the same price.

Q. Whether you did or not, Mr. Rice, but the clause says that this—what I have called the government's control clause—gives the government the right to determine the bidder's f. o. b. mill by deducting commercial freight rates, and then if the bid accepts that invitation, the government has the right under the invitation, does it not? Do you want to change that statement in any way? Is there any question about that being the statement in here that the government uses in that control clause?

A. This statement here?

Q. Yes.

A. No, that is what is in this invitation. There is no question in my mind.

1724 Q. And as to the respondents' control clause, the Hermitage—

Examiner Norwood: (Interposing.) Off the record—

(Discussion off the record.)

By Mr. Leisure:

Q. Now, not only does that clause, Mr. Rice, give the government the right to deduct commercial rates, but it also gives the government title f. o. b. mill, does it not? For instance, it says "Shipments to be made on government bill of lading with transportation cost for shipment or shipments to destination payable by the government." It does those two things, does it not?

A. Only property and troops of the United States can be shipped on government bill of lading, therefore we would have to have title to ship in that way.

Q. It gives them title f. o. b. point of shipment?

A. Yes.

Q. And this respondents' control clause, it does the same thing, does it not? It says, "On United States Government bill of lading." It gives the government title f. o. b. mill or shipping point, does it not?

A. That is right.

Q. So the government's control clause gives the government the right of getting a title f. o. b. mill, and gives it the right to deduct the commercial rate. Now, the 1725 other control clause does two things also, does it not?

It gives the government the right to deduct the land grant rate and gives the government title f. o. b. point of shipment, is that correct?

A. That is correct.

Q. In other words, one control clause allows for the deduction of the commercial rate, and the other control clause, the respondents' control clause, allows for the deduction of the land grant rate, is that correct? It says, "Whichever rate is the lower."

A. Yes.

Q. And the land grant rate would always be lower than the commercial rate, Mr. Rice?

A. Yes.

Q. And is the answer to my question, yes?

A. Yes.

Examiner Norwood: Or a special rate.

The Witness: If there is very much land grant involved, of course the land grant rate would be presumed to be lower.

By Mr. Leisure:

Q. The land grant rate is a special rate to the government, is it not?

A. That is right.

Q. Now, with regard to that, no one is particularly
1726 happy with that special rate to the government today except the government, are they? I mean, neither the shippers or the railroads are particularly happy with that special rate to the government today?

A. (No answer.)

Q. Haven't you heard numerous complaints from railroads to the effect that when these contracts were entered into back in the last century, it was not within the contemplation of the parties, there was no meeting of the minds that the government would go into business and ship millions of dollars worth of freight over them? The contracting parties had in mind that they would ship government troops and the ordinary shipments of the government would be used in those contracts? Haven't you had those complaints?

A. All of the Acts read, "Property and troops of the United States."

Q. Yes, precisely.

A. I have not had any official complaint. No railroad has ever written into our office that I have ever seen.

Q. Who in the War Department would have those complaints?

A. Well, if any of them had been received, I suspect the Quartermaster General's office, which has custody of all transportation matters.

Q. Do you not know of any where the railroads have
1727 complained that the government has been paid five times over on those contracts already, and that they never contemplated any such business enterprises as the government is entering into today? Have you never seen any such complaints of that kind?

1729 Q. Now, as bearing upon that, all the other special rates that were given back in the 19th Century, those have all been canceled except this one special rate of the Government? I mean, when a man owned some land and had a special rate over the railroad, the I.C.C. has canceled all of those long before this, hasn't it?

A. That is my recollection. Of course, I am not very familiar with that phase of it.

Q. There is only this one old antique that is left, the land grant rate that the Government still holds? You do not know of any other special rates that are existing today on the railroads, do you?

A. Not with individuals, no, I do it.

Q. Or corporations?

A. No.

Q. Not only are the railroads unhappy about these land grant rates, but the shippers all over the country are not very much pleased with them? You have had a lot of complaints from the shippers, too, haven't you?

A. I don't know that I have seen any complaints by them.

Q. Suppose you were a shipper on a land grant road and trying to do business with the Government, and there was a shipper on another road not a land grant rate,
1730 would you or would you not think that you had a legitimate complaint if all of the business was going to the man on the land grant road?

A. Well, if I were a shipper that was not on a land grant road, I would probably think that I was not advantageously located; I would not say unfairly located.

Q. As to Government business?

A. No, I would simply think I was not in the right location.

Q. That you were just out of luck?

A. The way I look at the land grant rate proposition is that something was given to the Government for the huge tracts of land that were public lands, something that the Government has paid for. If the railroads made a bad bargain, it is something else.

Q. As a lawyer, do you contend that when you did not have in contemplation any of the things that are being used today, and that you had ordinary shipments of troops in mind—

A. (Interrupting) All of the land grant rates that I have seen say "Property and troops of the United States."

Q. That is right; precisely.

Examiner Norwood: I think you are getting away off of the track.

By Mr. Leisure:

Q. It did not say anything about hundreds of thousands of dollars of property for big Boulder Dam, did it?

1731 A. (No response.)

Q. Now, as to these land grant freight rates, I believe you said on direct that it was the policy of the Department not to make them publicly known. Do you know of any reason for the secrecy?

A. No, sir, to be frank I do not. That is the policy of the Quartermaster General, and we have no control over that at all.

Q. As a matter of fact, the War Department did at one time publish a pamphlet which quoted these rates, did it not?

A. I understand that there was some publication.

Q. Now, I understood that you have stated or felt on the direct that the operation of this control clause, the respondent's control clause—not the Government's control clause—the respondent's control clause operated to deprive the Government of its land grant freight rates, is that correct?

A. That is correct.

Q. Well, now, Mr. Rice, this would not have happened in any instance if the mill had included the land grant rate in its bid, would it?

A. You mean if they correctly figured the land grant rate? No, I would not think it would.

Q. Now, as to the Government's control clause in allowing the deduction of the commercial rate, rather than the lowest rate, does that or does that not work out in-
1732 equitably to the mill? Will you just take this pad (handing paper to the witness) and suppose you have the Government control clause allowing for the deduction of the commercial rate; now, suppose the mill has set as its price base $2. Will you write "Mill, $2"?

A. (The witness complies.)

Q. And it must have this $2 to pay its overhead. Now, suppose the land grant rate is 25 cents. Would you write 25 cents under the $2?

A. (The witness complies.)

Q. Now, that total is $2.25?

A. Yes.

Q. Therefore, the mill submits a bid, Mr. Rice, of $2.25. Now, suppose the Government accepts that bid but only with the proviso that its own control clause will be used, namely, that the commercial rate will be deducted. Now, suppose the commercial rate is 50 cents. Will you write "50 cents" under the bid of $2.25?

A. (The witness complies.)

Q. And will you designate 50 cents the commercial rate?

A. (The witness complies.)

Q. Now, if you subtract that 50 cents from the $2.25, you get $1.75, do you not?

A. That is right.

Q. So the Government gets its 25 cents or land grant
1733 freight rate which it is entitled to. Does it get anything else?

A. Well, on this calculation here, you show that they get 25 cents additional.

Q. So in the instance that we have figured out here, the Government would get its land grant rate twice, would it not? Twenty-five cents and 25 cents per barrel?

A. That is correct, based on this.

Q. And the mill in that instance would get a loss of 25 cents per barrel at the mill?

A. Yes.

Q. You gave some instances, Mr. Rice, the other day where these land grant freight rates were published and were used. I think it was Fort Peck. When the land freight rates are published and used in the invitation, have you ever had any difficulty with the figuring of the amounts? Is it or is it not true that has always been when they are secret that there has been difficulty about the amounts that are used?

A. There are only two or three instances that I recall where they were ever published, and I know of no difficulty with regard to the rates that came.

Q. When the Government struck it out in the invitation, you had no complaint from anyone about the land grant freight rate?

A. No.

1734 Q. Now, I understood from your direct examination that you felt that if the Government should purchase f. o. b. mill that would allow the Government to take full advantage of its land grant freight rates?

A. That is correct.

Q. So according to what you have just told us, there is one other way that it can be done, and that would be by publishing it; is that not so?

A. That would afford the opportunity of knowing exactly what rates we were going to figure on.

Q. Now as to where these bids are figured, Mr. Rice, in Exhibit 168-C, the Fort Peck bid 72535, paragraph B provides: "Bids will be canvassed on the basis of the lowest delivered cost to the United States." Did you understand that, "Bids will be canvassed on the basis of the lowest delivered cost to the United States"?

A. Yes.

Q. Just what does that mean, this clause?

A. Well, that means on the basis of any bids that are received we will determine what the article will cost at destination. Take for instance this abstract that you have here, there is a better way of figuring the lower destination cost of the cement than there would be if there not two sets of prices.

Q. Does that mean, Mr. Rice, that the successful
1735 bidder will be determined at the destination?

A. That is correct.

Q. Well, now, as against the suggestion that I just asked you about, that you could get the benefit of the land grant rate if f. o. b. mill prices were quoted, when it is known in the invitation itself, such as in this case that I have just cited, that the place the successful bidder will be determined is at destination; don't you think it is inevitable that competitors will submit their bids at the market place rather than somewhere else, namely, destination in this instance? Is not that inevitable when you send that kind of an invitation out?

A. Well, I do not really know about that. Of course we have to determine to whom we will give an award based on the total cost to the Government.

Q. But don't you think that forces a man who must be a successful bidder against his competitors, don't you think that forces him to submit a bid where he thinks it will be successful, namely, destination? In other words, I mean if there is anything wrong with destination bids, is not that forced upon these people by the Government itself in sending out these kinds of invitations?

A. Well, I have never given that any consideration.

Q. Do you remember the Broad Street Curb Exchange when the men stood there with green hats on and
1736 made signals on Broad Street bidding on certain prices of stock?

A. I am afraid I do not.

Q. Well, it is inevitable that a competitor, if he wants to meet competition, will go where the competition is and will try to meet it at the market place, there can be no doubt about that, can there, Mr. Rice?

A. I agree with you on that.

Q. Now, Mr. Rice, based on your experience in the entire time that you have been in the Government service,

can you give me any instance where the Government has been compelled to pay a higher price for cement than the prevailing commercial rate at the time and place? Can you give me any instance?

A. No, I do not know of any.

Q. Now, as to these identical bids, taking any of them, such as the ones we were talking about here a moment ago, that bid 157; I notice not only for the bids at the top but there is almost three-quarters of the page, more than half the page, taken up under the heading of "Remarks." I suppose instead of my testifying I should ask you what they do refer to, those remarks?

1737 A. Well, this is a brief summary of any conditions that are attached to the bids, such as, well, if some bidder only wanted half of the total amount, or offering discount for payment within a certain number of days, or maybe he did not want to keep up with the particular prescribed rate of delivery, or something of that sort. It summarizes various things that appear in the different bids.

Q. It summarizes the difference in the various bids, is that right?

A. Well, any difference at those items, yes.

Q. They would appear in the "Remarks?"

A. That is correct, anything that is not typical of these bids will be put in there.

Q. And that will be true of all of the abstracts that were already offered in evidence, those differences would be listed under the heading "Remarks?"

A. That is correct.

Q. Now Mr. Wooden asked you about the varying qualities of the cement. In one bid, Exhibit 178, there were variations in the compressive strength. Would your department, Mr. Rice, as long as the cement covered the minimum requirements, would they have paid a penny more for any of these other cements that had different strength tests?

A. We could not pay any more if it met the specification requirements.

1738 Q. On Exhibit 185 I notice there is a statement down at the bottom called "Original estimated cost." Will you just read that, will you read what it says?

A. "Original estimated cost $125,000."

Q. Yes. Now there were eleven bidders in that instance, were there not?

A. That is correct.

Q. Now will you tell the Examiner whether or not that shows the nine bids out of the eleven were below the government estimated cost?

A. Yes, nine out of the eleven are below the $125,000.

Examiner Norwood: What is the estimated cost? Is that on the abstract or on the invitations?

The Witness: That is just put on the abstract.

Examiner Norwood: That is an advance estimate?

The Witness: It is an estimate which is prepared. There are two items that they have to show in these abstract of bids, one is how much money is available, and in this case the amount—well, they do not show it here—the amount that is available, and then the original estimated cost.

Examiner Norwood: That is something that is made out prior to the receipt of the bids?

The Witness: Based upon the best information available they figure out how much they are going to
1739 have to spend.

1741 *Cross Examination by Mr. Hershberger.*

Q. On this bid, this contract that was made specially, Mr. Rice, with the Huron Company after a number of bids were rejected because they were excessive, as I recall it, the bid price which the Huron made in the special contract ran into a number of decimal points per barrel, did it not?

A. I believe it did. That is the way it figured out at the mill.

Q. Yes. Now, do you know what the reason was for its running into the number of decimal points?

A. I have not the slightest idea. It may have been a lump sum price for 605,000 and divided out that way. The file did not disclose that at all.

Q. You do not know whether land grant rates had anything to do with that or not?

A. I do not really know.

Q. How?

1742 A. I do not know.

Q. Land grant rates might have had an effect to produce a price in that case that would run unto the decimal points, might it not?

A. Huron might have said, "We will deliver to you 600,000," or something like that, "and let you take off the land grant," and subtracted that and the balance was the contract price. I do not know. I could develop it for you if you wanted to know, but it would be my idea that Huron gave a lump sum figure and figured out approximately what the Division Engineer thought was the fair price based on the existing contract, and by subtracting the land grant you got this figure with four or five decimal places, but I do not know.

Mr. Hershberger: That is all.

Cross Examination by Mr. Zimmerman.

Q. Again referring to the contract of the Huron Company of June 10, 1936, Commission's Exhibit 329, was it possible to make a private contract for so large an amount of cement without advertising for bidders and without violating any statute?

A. That is the one transaction, as I look at it, and I think there was a formal advertisement for bids, and within the judgment of the contracting officer satisfactory bids had not been received. Now 3709 Revised Statutes provides purchases for the Government shall be advertised.

1743 Q. That is right.

A. Having not received what we considered satisfactory bids I see no objection, or violation of any statute, to negotiate with all non-suppliers and find out the best price we can get.

Q. That is, once having advertised and once having determined that the bids are not satisfactory, then you may proceed to shop around in the open market until you get a satisfactory price?

A. The statute government advertisements, as I recall, does not require but one advertisement, and if we do not get suitable bids we can go out buy anywhere we can at a satisfactory price.

Q. Quite so.

A. Yes.

Q. And you did eventually get a satisfactory price there?

A. Apparently the Division Engineer thought so. He recommended it.

Q. Now, as to the bids that had been made prior to that time and that were thrown out, it would not matter what kind of bids they were, no harm was done to the Government by those bids? Does that seem to be correct?

1744 A. I do not know that there was any particular harm done to the Government. We were unable to get a contract out of them, we just rejected the bids.

Q. In other words, you just chucked them out and paid no further attention to them?

A. That is right.

Q. I notice on page 1457 of the record you made some reference to an opinion of the Comptroller General, I believe dated February 5, 1937, that stated that "Where the United States requires delivery of the cement contracting agencies may have no choice but to accept the lowest or more advantageous bid received, after proper advertising." Well, now, as a matter of fact, they do have the choice of declining all of the bids and shopping around, if they desire to do so? The statement that I have just read from this opinion of the Comptroller General is not quite accurate then, is it?

A. Well, that portion of it would appear as not quite accurate, but without benefit of the whole decision I could not state.

Q. Well, you did not quote the whole decision, as I see it. Do you want to look at the portion of the record? I have no objection to showing it to you. It may be that I should have quoted more of it. (Handing the document to the witness.)

A. Yes, I would say that was not quite a complete statement.

1745, Q. Now, is there anything you want to add to it?

A. No, no. That is complete as far as the Comptroller is concerned, that part of the decision.

Q. That is what I thought, yes. Now, where you get bids that are based on what we refer to as the destination cost, they are in fact a form of f.o.b. mill bids, are they not?

A. I do not think so.

Q. Well, for example, let us again refer to Commission's Exhibit No. 157. I would appreciate it very much if counsel for the Commission can conveniently let the witness have that exhibit No. 157.

(The document was handed to the witness.)

Q. Now, if you will read from the bottom of that, under the title "Award", see if I quote this correctly: "Award made to bidder No. 12, the lowest bidder as to price f.o.b. cars at contractor's shipping point." That is correctly quoted, is it not? I merely wanted to know whether it is correctly quoted and then we will go to something else.

A. Yes, that is quoted correctly in this abstract.

Q. All right. Now that does refer to the destination cost bid, does it not?

A. That is correct.

Q. So that it is apparent from the award that that was considered, and the award was made as a price f.o.b. the contractor's shipping point, isn't that correct?

1746 A. That is correct.

Q. Now, I notice that on record page 1440, in referring to the Exhibits 156 and 157, I mean Commission's exhibits, you were asked, "Do you get bids f.o.b. shipping point?" and you replied, "No." Would you say that that answer was strictly correct? In view of what you have read from the award would you say that answer was strictly correct?

A. From this abstract? (indicating)

Q. Yes.

A. Well, I think my answer was correct, that we did not get any bids f.o.b. shipping point.

Q. How then were you able to make an award of the bid f.o.b. shipping point?

A. Because the specifications provided that for the purpose of an award land grant rates would be subtracted from these prices.

Q. But the bid was made, was it not, showing that such might be deducted from the destination cost in order to determine what the f.o.b. shipping point bid was, is that not so?

A. That is correct.

Q. And the bid was considered then, and the award made, as you said a while ago, on the basis of f.o.b. cars contractor's shipping point?

A. By a process of subtraction.

1747 Q. By a process indicated in the bit itself, is that not so?

A. That is correct.

Q. Then you still insist there was no f.o.b. shipping point bid?

1748 A. I do not consider that an f. o. b. shipping point bid.

Q. I just wanted to be clear on it so we might weigh your answer by that method. Now these destination cost bids that were made, what was the f. o. b. mill price that was bid by Bidder No. 12, that you can determine from Commission's Exhibit 157? Just the amount of it, not the barrels but the total amount.

A. Did you say not figured at the mill?

Q. Yes. What was the amount?

A. $27,284.76.

Q. Now that you find in the fifth column of figures counting from the left towards the right opposite the name "Consolidated Cement Corporation," do you not?

A. The sixth column is it, Mr. Zimmerman?

Q. Well, I figured it was the fifth column of figures. Maybe I counted wrong.

A. You are talking about this price, are you not? (Indicating).

Q. My arithmetic is bad. The sixth column.

A. That is correct, it is in the sixth column opposite "Consolidated Cement Corporation."

Q. And in that column immediately above that figure are the f. o. b. shipping point prices figured for each one of the other bidders, that is correct, is it not?

A. That is correct.

1749 Q. Are any two of them alike?

A. I think not.

Q. Now do your records show what was actually paid to the successful bidder, that is to say, would you have a copy of the invoice that was rendered by the successful bidder?

A. The District Engineer at Vicksburg would have such a document.

Q. You would not have it?

A. We would not have it, no, sir.

1750 Q. Do you have the figures as to land grant rates from each of the shipping points referred to on Commission's Exhibit 157, so that you can tell us whether the land grant rates appearing on this abstract are correct?

A. We do not have that in our own office. That was communicated to the District Engineer at Vicksburg by the Quartermaster General.

Q. Well, now, these abstracts when the letting is made,

copies of these abstracts are given out to the bidders, are they not?

A. To any that want them.

Q. And that would indicate in each instance what the land grant rate was, wouldn't it? Just taking this exhibit 157 as an example of such a case.

A. If the abstract as given to the various bidders is a copy of this paper, I would say yes.

Q. So that at least from that time on they would know what the land grant rate was that would be applicable from their mill to that particular delivery point, until there was a change in the rate?

A. That is correct.

Q. So always from time to time in all such instances, there is an open publication of the correct land grant rate by the distribution of these extracts, is that not so?

A. That is correct.

1751 Q. May I go a little bit further with you in the method pursued in the selection of these exhibits which you have identified. Was there any effort at all to search for instances where any of the respondents had bid plain unadorned f. o. b. mill prices to the government?

A. I wrote every one of the letters and telegrams that went out getting these papers in, and there was absolutely no effort to make any selection with a view to getting documents—only in picking out those that would be most favorable to the government. As I said a while ago before recess—

Q. (Interposing): Just a moment, you are not answering my question.

A. Well, I think I will if you let me continue.

Q. I would not have suggested that you would have done anything of that kind.

Mr. Zimmerman: It is not responsive and I move that it be stricken out, and I suggest that the witness pay attention to the question and answer it directly. May we start fresh?

Examiner Norwood: Motion denied. I think he is in the process of answering the question.

Mr. Zimmerman: May I have the question read? I think it can be answered.

(The question is read.)

Examiner Norwood: Now, Mr. Reporter, read the
1752 answer as far as he has gone.

(The answer is read.)

Mr. Zimmerman: I have not thought or suggested the picking out of anything favorable or unfavorable to any one. The question was a simple one whether or not they had made any effort to pick out those which were plain unadorned mill prices.

Examiner Norwood: You can bring out anything further.

By Mr. Zimmerman:

Q. Was there any such effort made?

A. I was just getting to the point. I said to Mr. Leisure this morning—

Q. (Interposing): Excuse me, Mr. Rice. That question in the way that I asked it simply calls for an answer whether there was or was not.

A. We made no effort to get any. We simply wanted the largest purchases of cement.

Q. Did you specify any minimum or maximum amount?

A. I believe we asked for those in the larger quantities.

Q. Well, did you designate—

A. (Interposing): I don't remember that we designated a quantity of barrels, but we wanted the largest they had.

Q. Well, would you say so much as 25,000 barrels be considered a fairly large quantity?

1753 A. To some of the districts that I wrote to, 25,000 barrels would be a very very small quantity.

Q. And you would not expect to have had as little as 25,000?

A. Oh, yes, we have had them here. Here is one here 22,500.

Q. Would you say that say 50,000—would you expect to get a lot of those?

A. Yes, I think we would get an assortment of those.

Q. And 100,000, certainly you would expect, wouldn't you?

A. That is correct.

Q. In fact, you would expect to get all of those that involved so much as 100,000?

A. Oh, not all. We did not ask for all. We asked just for a representative group.

Q. How were they to determine what was representative?

A. Well, if they had a half dozen of them of 100,000 barrels, they would just send in one or two. We would

not want to go to the expense of photostating six of them if we could get just two.

Q. If you got up to 175,000 or 200,000, certainly you would expect to get those, wouldn't you?

A. I think the same answer is applicable that we only wanted a few from each district that we sent to.

Q. Did you make any time limit as to how many years they should go back or between what years they should search?

A. I don't remember that we did.

1754 Mr. Wooden: I could answer some of those questions.

Mr. Zimmerman: I will get to you a little bit later if you don't mind. We will make you the next witness.

(Laughter.)

By Mr. Zimmerman:

Q. Now, on page 1443 of the record, I think you made the suggestion with reference to the letting in connection with the bid there under discussion, that the award was made to the company that was the successful bidder, "so that we might follow out the provisions of the advertisement for the bid as far as possible, in view of the prices we had received and the conditions that were attached to them." And you made special reference to paragraph 6 of the specifications which provided that the award would be made on the basis of the lowest delivered cost to the government, and that in the event the bidder failed to quote a price f. o. b. mill, the government should have the right

to determine the f. o. b. mill price by deducting the

1755 f. o. b. destination price, and so forth. You remember that Clause 6, I am sure, very well indeed.

A. Yes.

Q. I think that this refers to the same Exhibit 157. Did you make the award based upon an application of paragraph 6?

A. We made the award under paragraph 6.

Q. That is to say, what you did was to take the price that was bid by Consolidated Cement Corporation and deduct from it the commercial freight rate or the entire amount of the commercial rate from its mill to the destination, and then add back the land grant rate; is that what you did?

A. That is my recollection.

Q. Now, can you tell us what the net price was that resulted from that process of figuring?

A. The net payment to the mill is shown on the abstract as $27,284.76.

Q. Oh, no. That is the amount of their destination cost or their f.o.b. mill bid.

A. That is the amount that we are paying.

Q. Excuse me; that would not require you to apply the provisions of paragraph 6 in order to get that price, would it?

A. Well, the provisions of paragraph 6—this paragraph here is a basis upon which we will determine the lowest bidder.

Examiner Norwood: And on that basis you found that?

1756 The Witness: On that basis we found that it was to the interests of the United States that this bid here be based on this allowance of the land grant rate.

Q. Then you did not apply paragraph 6. Paragraph 6 applies only where there was no f.o.b. mill price. Take your time.

A. (Examining paper): I am reading this paragraph 6 as a whole. The first sentence says: "Award will be made on the basis of the lowest cost to the Government of the cement delivered f.o.b. Greenville." And down here it says, "In the event the bidder fails to quote the price f.o.b. shipping point, he may reserve the right to determine the bidder's price f.o.b. shipping point by deducting the commercial rate."

When those calculations were made, it was determined that this bid here is the most advantageous price, and that is the reason the award was made. It was still made on the basis of the lowest cost of the cement to the Government.

Q. Paragraph 6 is supposed to be applied in any or every case where the bidder fails to quote a price f.o.b. mill, isn't that so?

A. That is correct.

Q. So in this instance you assumed that paragraph 6 need not be applied in that fashion, and made the award to Consolidated on its destination cost?

A. I think that it was followed in spirit. The award was made clearly in accordance with the advertisement.

1757 Q. Let us get away from the spiritual world and get back to the world of facts. See if you did or did not apply the rule as laid down in paragraph 6 of deducting the commercial freight rate from the amount bid by the successful bidder, and then adding the land grant rate? Is that what you did or not?

A. The award was made to the Consolidated on the basis of its destination cost price less the Government rate.

Mr. Zimmerman: Will you read my question, please?

(The question was read.)

Examiner Norwood: Did you do that to get this $27,284.76?

Mr. Zimmerman: That simplifies it.

The Witness. It was done and this price was considered to be most advantageous and it was accepted.

Mr. Zimmerman: I do not believe you have answered the question.

Q. Mr. Rice, you have before you, I believe, Commission's Exhibit 171-A and B. Can you produce the invitation to bid in connection with that? I think it was not produced.

A. I can get a copy of it.

1758 Q. I am sorry, sir; that is Exhibit 192 that I want you to look at. I misread the figure. Now, is the invitation to bid there on Exhibit 192?

A. I do not believe it is.

Q. Can you produce that invitation? I am interested in this, because I believe that that is the one that the Marquette Cement Manufacturing Company bid on? That is correct, is it not? Can you tell from that exhibit?

A. From Exhibit 192, Marquette is the No. 2 bidder.

Q. Now, can you tell whether or not Marquette bid an f.o.b. mill price on that?

A. The abstract shows that Marquette has submitted f.o.b. cars contractor's mill prices, and also f.o.b. Government barges contractor's mill.

Q. Which were the types of bids that were requested?

A. Well, I could not say that unless I had the invitation.

Q. Can you have that invitation tomorrow morning?

A. I would have to send to Memphis for it. I could have it here the last of the week.

Q. All right; will you undertake to do that for me, please?

A. Yes.

Q. Now, can you tell us whether or not there were any contracts let under the bid referred to in Commission's Exhibit 192?

A. This abstract shows a notation, "All bids re-
1759 jected and cement readvertised under amended specifications."

Q. It was afterwards relet under date of June 28, 1934, was it not?

A. I could not say just from this file.

Q. You can find out between now and tomorrow morning whether that is true by looking at the abstract of bids of that date, can you not?

A. I might have the record of that in the office.

Q. Will you make an effort to do that for me?

A. What was the date of the readvertisement?

Q. The date that I have here is June 28, 1934, 130,000 barrels. That is the date that they were opened. And if you can do so and if you find that you have it, I would also like to have the invitation to bid in that case so that we may determine just what the conditions applicable to the letting were.

A. If I do not find these papers, I will have to also secure them from Memphis.

Q. Yes, I understand that, but you can tell us by tomorrow morning what that situation is. It would not be possible, would it, to tell us what the conditions of the bidding were from the abstract in any of those cases?

A. I would not want to make a statement based on the abstract.

Q. Well, now, you could tell from your files in how
1760 many instances Marquette Cement Manufacturing Company had submitted f.o.b. mill bids to the Government, especially if I were to give you the dates of them, couldn't you?

A. That could be done if you submitted the necessary information to run the invitations down on which you submitted bids. We could tell you how your company bid according to our records.

Q. Now, suppose we make a note of these instances then. 5-4-25, 80,000 barrels, Louisville.

4-10-26, 60,000 barrels, Vicksburg—this only purports to be a partial list—

9-9-26, 2500 barrels—that is the Department of the Interior, which would not help you any. You could not find that?

A. No.

Q. Then we will pass that.

2-25-27, 40,000 barrels, Louisville.

11-18-27, 17,000 barrels, Louisville.

4-14-27, 9800 barrels, Chicago.

8-9-28, 25,000 barrels, Memphis.

8-20-28, 60,000 barrels, Mississippi River, First and Second Districts.

4-2-29, 3400 barrels, Chicago.

6-3-29, 175,000 barrels, Memphis.

12-17-29, Mississippi River, First and Second Districts.

1761 Mr. Wooden: Your Honor, may I interrupt at this point to suggest that all of this information of cost is kept in the possession of Mr. Zimmerman's client, and that leads to the suggestion that it is more properly a part of his case rather than to be put in through cross examination of this witness.

Examiner Norwood: He wants these papers in order to cross examination this witness on these matters that have been brought out.

Mr. Wooden: Of course, he is going back into a period there that we have very little to do with.

Mr. Zimmerman: You produced one from 1928 the other day.

Examiner Norwood: The testimony is about those things.

Mr. Wooden: We did not examine him on those particular projects.

Mr. Zimmerman: But the subject-matter, you did.

Examiner Norwood: I could not prevent him from doing that. Proceed.

By Mr. Zimmerman:

Q: 4-17-30, Third Mississippi River District, 1200 barrels.

5-5-30, 7000 barrels, Chicago.

2-18-30, 150 barrels, Rock Island.

6-9-30, 300 barrels, Rock Island.

1762 6-16-30, 50,000 barrels, Greenville, Mississippi. That is the Third Mississippi River District.

6-20-30, 100,000 barrels, Mississippi River First and Second Districts.

8-1-30, 1300 barrels, Louisville.

10-28-1930, 1500 barrels, Vicksburg.

2-4-31 12,000 barrels, Mississippi River, First and Second District.

2-10-31, 1500 barrels, Vicksburg, Third Mississippi River District.

3-31-31, 6500 barrels, Second Chicago District.

6-26-31, 240,000 barrels, Memphis.

10-13-31, 1500 barrels, Mississippi River Third District.

10-15-31, 60,000 barrels, Mississippi River First and Second Districts.

11-11-31, 60,000 barrels, Mississippi River, First and Second Districts.

1763 4-11-32, 9,000 barrels, Second Chicago District.

Mr. Wooden: Again may I suggest that the record shows that the so-called control clause providing for government destination cost was inaugurated some time during the code period, and what the exact facts may be back beyond that the record does not yet establish, but all these instances which Mr. Zimmerman has mentioned so far are prior to the code period.

Mr. Zimmerman: Well, that one you mentioned here 1928, the other day, was too.

Mr. Wooden: There was not any control clause. I believe in that case there was a land grant rate involved, that is true.

Examiner Norwood: We will get the papers and see what is in them.

Mr. Zimmerman: June 14, 1932, 400,000 barrels, First and Second Mississippi River Districts.

8-25-33, 20,000 sacks,—that is a minimum and maximum, as I understand it, Nashville.

9-20-33, 120,000 barrels, Memphis.

November 14, 1933, 30,000 barrels, First and Second Mississippi River Districts.

This says "Bids of January 19, 1934 and January 24, 1934, 7,000 barrels, Wilson Dam."

By Mr. Zimmerman:

1764 Q. Is that sufficient information on that?

A. Yes.

Q. 2-5-34, 3,000 barrels, Clinton, Tennessee. Will that

help any? Requisition No.—that will not help you. I think that is T. V. A.

A. That does not sound like anything of ours.

Q. T. V. A. is not yours?

A. No.

Q. What department would that be? The Interior Department?

A. No, that is a separate institution, the Tennessee Valley Authority.

Mr. Wooden: It appears to me, your Honor, that Mr. Zimmerman is showing exactly what he inferred that we might have done with regard to selection. He is showing a selection of papers where they did bid on an f.o.b. mill basis.

Examiner Norwood: I think each side has the right of selecting.

Mr. Wooden: All right.

Examiner Norwood: All those papers that you are asking for relate to bids that have been brought out in the evidence here?

Mr. Wooden: No.

Mr. Zimmerman: They are related to the department from which this witness comes and where this wit-
1765 ness says that abstracts thereof have all come to his office.

Examiner Norwood: You are trying to get information as to other bids, other than the ones that have been introduced here by the government?

Mr. Zimmerman: Quite so, but germane to the subject matter.

Examiner Norwood: I think you have a right to that.

Mr. Wooden: Your Honor, I want to make it plain that I have no objection to the fullest showing upon this particular point that can be made, the only point I make is that it is an imposition on this particular witness.

Examiner Norwood: He can ask this witness about that, but I think that is his case, he should put that in in his case. He is getting it in on cross examination. You can go ahead and put in the record here your request for this information.

Mr. Zimmerman: I am perfectly willing to stipulate with counsel, if he wants to do so, that we put in f.o.b. mill bids and what the total is, subject to check.

Mr. Wooden: I haven't any doubt that he did say that in some cases that was done. We showed how it worked out and then why it was done, too.

Mr. Zimmerman: What I am undertaking to do is to show f.o.b. mill bids by my client from year to year, right up to 1937.

1766 Mr. Zimmerman: What was the last one I gave?

(The record was read.)

By Mr. Zimmerman:

Q. April 3, 1934, 4,000 barrels Vicksburg.

1767 6-28-34, 130,000 barrels, Memphis.

5-10-35, 100,000 barrels, Memphis.

8-3-1936, 53,000 barrels, Memphis.

I guess that is all at the moment that are in your Department.

Mr. Zimmerman: I would like to have you produce the Marquette bid in each of the instances that I have cited, and if you can not find the bid bring what information there is in your file which will show what Marquette bid.

Mr. Wooden: I want to add to that, we want to know what other bidders bid and on what basis. If that can be shown by the abstract, all right.

Mr. MacIntyre: In each of the instances, you mean?

Mr. Wooden: In each case, yes.

By Mr. Zimmerman:

Q. Now, then, while you are looking up those things I would also like to have you produce the original of Commission's Exhibit 165. The exhibit is a photostatic copy of an abstract of bids opened May 10, 1934, by the Division Engineer, Missouri River Division, Kansas City, which was referred to on record page 1516.

I would also like the original of Commission's Ex-
1768 hibit 166. The exhibit itself is a photostatic copy of an abstract of the bids received by Missouri River Division of Kansas City, June 5, 1934.

Let me make it clear, Mr. Rice. I do not want only the photostatic copy, I want the original from which the photostats were made.

Mr. Zimmerman: Now, Commission's Exhibit 168-A is referred to on page 1526 of the record, I believe, a copy of which you produced here, an abstract of bids received by the Division Engineer of the Missouri River Division, July 25, 1935.

On page 1452 of the record, Mr. Rice, you referred to the Comptroller General's Decision No. A-83059 of January 28, 1937; then you express some opinion relative to that opinion of the Comptroller General. I presume you did read that opinion A-83059 of January 28, 1937, did you not?

The Witness: That is right.

By Mr. Zimmerman:

Q. And you were familiar with it?

A. Yes, sir.

Q. Well, were you familiar with this part of it?

1769 Just to refresh your recollection I am reading now,—if counsel wants to check it, it is on page 698, Volume 16, of the January 1937 Decision of the Acting Comptroller General of the United States,—it is as follows:

"The decisions of this office have been to the effect that cost of delivery is always a matter for consideration by the Government in determining which is in fact the lowest bid received. (10 Comptroller General 402.) In order that this may be accomplished the advertisement for bids should provide for submission of bids f. o. b. Government's destination and f. o. b. points of bidder's selection—factory or otherwise—so that the Government, having regard for land grant or other advantages available in such connection, may accept that bid which will result in the lowest net available charge against public money.

"It appears in this case bids were requested as required by the decisions of this office, and submitting their bids each of the bidders quoted a price with the understanding that the cement should be shipped on Government bill of lading and that the amount of freight incurred by the Government should be deducted therefrom. There would appear to be no objection to the submission and consideration of bids on such a basis.

"Answering your question specifically, you are advised that the only bid which may be accepted in this in-

1770 stance is one which will result in the lowest net charge against public moneys considering cost to Government the effect of delivery."

Do you recall that?

A. I do.

1771 Q. So that it was the rule that in making awards, the thing that you were primarily and essentially

interested in was what it would cost the government for cement at the point of delivery?

A. That is correct.

Q. Now, did you look at that Comptroller General's opinion 402 that is referred to in the part of the opinion that I have just quoted?

A. I have looked at it. I did not look at it as recently as I have looked at this other decision.

Q. See if you recall this quotation from it:

"With respect to the matter of determining which is in fact the lowest bid received, and the question as to whether the cost of delivery of machinery at Oakland, California, the place where it is to be installed, maybe considered in making the award, no provision therefor having been made in the specification, it may be stated as a general rule that the cost of delivery of equipment, etc.; is always a matter of consideration by the government in determining what is in fact the lowest bid received."

That has been consistently the policy?

A. That is correct.

Q. Now, referring to Commission's Exhibit 161-B referred to on page 1493 of the record, that is one of those instances where the land grant rates to be used on the 1772 letting were contained in the specifications. Now, in the subsequent specifications for the same location, it would not have been necessary to repeat those land grant rates, would it?

A. It does not seem that it would.

Q. That is to say, having published them once, the various companies who may be respondents here would be advised of them and it would be perfectly natural that they should refer to them in making any subsequent bids for the same location?

A. That is right.

Q. That would be true in any similar case?

A. Yes.

Mr. Zimmerman: I think that is all; thank you very much.

1773 Washington, D. C.,
Wednesday, January 12, 1938.

1774 HERBERT H. RICE was recalled as a witness on behalf of the Commission, having been previously duly sworn, was examined and testified further as follows:

Cross-Examination by Mr. Zimmerman (Continued.)

Q. Mr. Rice, I believe you expressed an opinion—

A. (Interposing.) Mr. Zimmerman, before we start may I make a correction?

Q. Oh, certainly.

A. Yesterday you asked me if it was not my opinion that having once published land grant rates they would be available as a guide in the future in connection with future bidding.

Q. Unless and until there had been some change.

A. I wanted to make sure that was in the record.

Q. That was acknowledged.

A. Consulting authorities, they could be changed by several methods, either a change in the division of the rates applicable across the line between certain railroads, or be changed by the Secretary of War.

1775 Q. I think you will find my question did include that.

A. I don't remember. I just wanted to make sure of it having been covered. I thought I did not give a complete answer.

1776 Q. We all realize they are not permanent or fixed.

A. They can be fixed either by the Secretary of War or by the railroads, they can be changed.

Q. Now, I think you have expressed an opinion, Mr. Rice, as to the desire on the part of your department to have f. o. b. mill prices quoted. Would you desire, that is, would it be your judgment that it would be to the best interests of the Government if all the respondents would quote uniform f. o. b. mill prices?

Mr. Wooden: I doubt, Your Honor, that the witness is qualified to answer such a question.

Mr. Zimmerman: I have no doubt of his qualifications

at all. He has expressed many times his disapproval of the fact that we did not get them.

Examiner Norwood: Objection overruled.

A. I do not think the submitting of—well, I guess uniform f. o. b. prices would be better than probably a destination cost. When I speak of mill prices, we usually figure on a price that is applicable to the commodity at a certain mill, based on their efficiency of operation and production, independently figured by any other mill.

Q. For example, if you had three mills located in the same district where their cost of raw materials, labor
1777 and all those things were equal, would you expect their mill prices to be identical? You would, would you not, expect their mill prices to be identical with one another?

A. Well, I think there would be more reason for that than there would be in some of these lettings where we have had them spread from Pennsylvania to Kansas.

Q. Well, suppose all the cement mills would offer to the Government cement, we will say, for example, at $2 a barrel, would that be any improvement over the present situation? Not as to whether the price is fair or not, but I am referring to it as an identical uniform price at the mill.

A. In other words, you would get a mill price and every bidder would quote the same price?

Q. At the mill.

A. At the mill. That procedure would eliminate one argument that we had in the Vicksburg case, that there could not be any question as to the decision to make the award as to one mill as against another, the net delivered cost—it would vary in accordance with the land grant rates.

Q. Then the mill that was nearest freightwise would always have the advantage, is that not so?

A. Well, yes, considering land grant special rates, and all that sort of thing, the mill having the lowest freight rate.

Q. That would have a tendency, in your opinion, to make competition?

1778 A. I think it would make reasonable competition. I might explain what I mean by that. I do not feel that if we wanted some cement for Tygart Dam in West Virginia that a cement mill located in Nebraska, or out

in the State of California, would be economically located to compete with Pennsylvania mills.

Q. Well, they do not now, do they?

A. Well, we had one case here where they spread quite a distance apart in range.

Q. Well, so far as that?

A. Well, maybe California was stretching it a little.

Q. You are stretching it a little for the purpose of illustration?

A. I am trying to explain what I mean by "economically located." In other words, the competition ought to be within a reasonable distance.

Q. Well, would you consider it competitive if the cement mills—

Examiner Norwood (interrupting): I do not believe that this witness has been qualified as an expert on competition.

Mr. Zimmerman: I will not pursue this any further at all. Suppose I propound this one question and let you determine whether you think it proper? I would like to ask this:

1779 By Mr. Zimmerman:

Q. If you would consider it competitive if all the respondents' cement mills were to quote f. o. b. mill prices and in order to meet the competition of the mills located closest to the destination would adjust their mill prices to meet the destination freight?

1780 A. By offers to equalize?

Q. Yes, equalize the differences in freight.

A. I feel we would get competition wherever the prices were independently figured by each separate mill on any basis on which we would have to submit a price.

Mr. Zimmerman: I think that is all. Thank you very kindly.

Redirect Examination by Mr. Wooden.

Q. Mr. Rice, taking up just where Mr. Zimmerman left off, he asked you if the nearest mill freight-wise would not have the advantage if the bid was on an f. o. b. mill basis. I believe you agreed that it would.

Mr. Zimmerman: Excuse me for interrupting. The question was based upon a situation where all the mills had identical mill prices.

Mr. Wooden: All right.

Mr. Zimmerman: If, for example, all of them would bid, we will say, two dollars at the mill.

Mr. Wooden: Thank you. That will emphasize my point.

1781 Q. When the government puts out requests for bids f. o. b. mills, does it want or expect uniform bids f. o. b. mill?

A. No.

Q. It would really prefer to have the f. o. b. mill bids different, would it not?

A. Yes.

Q. Do you know anything about whether or not the costs of different mills vary, or whether they are the same as Mr. Zimmerman assumed them to be?

A. The only knowledge I have on the subject is that generally a manufacturing plant can produce an article of equal quality at a lower price if its efficiency of production is better than one of its competitors.

Q. There are quite a number of elements that enter into the cost, are there not?

A. Oh, I think so.

Q. Even taking Mr. Zimmerman's hypothesis of a uniform mill base price, and as I understood him, he figured that then the nearest mill would not have the advantage?

Mr. Zimmerman: Would have.

Mr. Wooden: That is what I thought I started out to say.

By Mr. Wooden:

Q. But can the government in buying, get the advantage of the proximity of the nearest mills under this govern-

1782 ment destination cost system of bidding?

A. Under the present system, we do not in the final analysis get any advantage whatsoever.

Q. Yesterday, Mr. Zimmerman asked you something about the government being interested in the lowest cost of cement at the delivery point rather than at the mill. Is not your whole problem how to get the lowest cost at the delivery point?

A. That is correct.

Q. And under this government destination cost system of bidding, are you able to get a lower cost at the destination point from one bidder than from another?

A. No, they are all the same.

Q. Now, with reference to this matter of publishing land grant rates and their remaining without change until republished in some way, you spoke of the division of rates between the railroads as one factor that might produce a change?

A. That is right.

Q. Do you know whether or not those rates of division or proportions of division between the railroads are published or known generally?

A. I understand they are not.

Q. They are matters entirely between the railroads and the government, is that right?

A. That is correct.

Q. I think you have testified that it is only in the
1783 exceptional instance, one or two appearing here in the record, where you published the land grant rates in your invitations?

A. I recall only two.

Q. Do you remember the instance of the Bonneville Dam late in 1934 where the bids were thrown out because of an alleged violation of the Code, and then were readvertised?

A. I remember something about that, yes, sir.

Q. Is it true or not that in the first letting, the first advertisement, the land grant rates were not published, and in the second that they were?

A. I do not recall. It seems to me offhand that they were published in the second one—

Q. (Interposing) That is what I am getting at.

A. But I am not quite sure on that at this time. I think it was the second one.

Q. And do you remember whether or not in the first instance where they were not published, that Calaveras bid was low, and in the second where they were published, that they were all identical?

A. That is right.

Q. Now, Mr. Zimmerman in asking you about this Huron contract, this special contract following the rejection of identical bids on the Fort Peck, he asked you some question to the effect whether any harm was done by the identical bidding in that case in view of your ability
1784 to get a lower price later by special negotiation with Huron. What about the loss of time and effort to put out these invitations and get competitive bids?

1785 A. Well, of course, when I said that no harm was done, I had not taken into account the expense of advertising. The formal solicitation of bids is an item of considerable cost. I was thinking within my recollection that the work was not delayed, but of course the Government was harmed in an unnecessary expenditure of money.

Q. You went through the motions of getting competitive bids nothing and then had to seek special—

A. (Interrupting) We had to go through another solicitation, either formally or informally—I don't know which—in order to get the special price.

Q. Do you know anything about whether other mills than Huron were approached with reference to making this special price on that letting?

A. I know nothing about that. The file does not disclose whether any such efforts were made.

Q. Coming to this so-called Government control clause that Mr. Leisure was asking you about, is that any more than a specification that any buyer is entitled to put in his conditions on which he will buy?

A. Well, I interpret that paragraph to simply mean that if we do not get any f. o. b. mill price, that we will figure who did submit what was in fact the lowest price at the mills, by that process. It is just a condition under which we are going to make the award if we are go-

1786 ing to proceed that way.

Q. And you give advance notice in your invitations that that is what you are going to do?

A. That is right.

Q. If the mills bid f. o. b. mill instead of delivered or at Government destination cost, would it be necessary for you to have any such so-called Government control clause in your invitation?

A. No, I would not see any need for that language in there then.

Q. Now, referring to the so-called industry control clause, the one about deducting whichever rate is lower, I think Mr. Leisure clearly indicated before he got through that that in effect meant in all cases the deduction of the land grant or special rate rather than the commercial rate. Is that your statement of your understanding of it?

A. Well, if provides for the deduction of whichever is less.

Q. And is the commercial rate ever lower than the land grant or the special rate?

A. No, I do not see how you could have the commercial rate the lowest.

Q. Would you say that there is a sort of a Hobson's choice, the effect of that so-called industry control clause?

A. I don't know much about that particular choice.

1787 I say it is very apparent as to which one you would have if the land grant and specials and commercials all became involved in the same situations in the same case.

Q. Do you know anything about how special rates compare with land grant rates, whether they are lower or higher than land grant rates?

A. Those that I have particularly noticed have been higher than land grant rates. They attempt to give to the Government a slightly reduced freight rate over a line between the points over which land grant rates would not be in effect, but would be naturally not all commercial. Within my recollection, that is the way the specials run. They will quote a special rate over a certain haul which is in effect a reduction of the commercial rate, but I have never noticed one of them that came as low as a land grant rate.

Q. Would you or would you not say that the so-called Government control clause and the so-called industry control clause are inconsistent or consistent with each other?

A. Well, I think they should be considered entirely separate. The clause that we put in our specification that we had under consideration yesterday referred to as the control clause, is a statement of the basis upon which

1788 we will proceed to determine the bidder to whom the award will be made.

Q. Well, let me shorten it somewhat. The so-called Government control clause provides for the deduction of the commercial rate?

A. That is right.

Q. The so-called industry control clause provides for the deduction of only the land grant rate or the special rate, is that right?

A. No. It provides for the deduction of the lowest rate.

Q. But you have already testified that the commercial rate is never lower than the land grant rate.

A. That is right. It would have that effect, yes.

Q. Then if one of those clauses is respected, the other cannot be carried out at the same time, is that right?

A. That is right.

Q. So it becomes a question of which so-called control clause is to be accepted and followed?

A. That is correct.

1789 Q. Now, Mr. Leisure asked you some question on which you professed I think lack of knowledge to the effect that there had been objection by shippers to government land grant rates. Did you ever know in your experience of shippers objecting to low railroad rates?

A. Well, none of them has ever come to my knowledge. I have never heard of any.

Q. Do you know whether or not cement shippers themselves have frequently gone to the Interstate Commerce Commission for lower rates?

A. No, I don't know that either.

Q. I believe you agreed with Mr. Leisure to the effect that if the actual land grant rates were used it would not deprive the government of the benefit of land grant rates. I will ask you how it can be that the government destination cost is identical from different bidders located at different points of shipment if they each used the actual land grant rate from its particular mills?

A. Well, that could not be. If they used only the rate applicable from their mill to destination, the only way they could be identical on destination prices on that basis would be to increase each respective mill by the amount necessary to make up the difference in the freight rates.

Q. Do you know at all how the land grant rate is figured or from what point or points it is figured on

1790 these destination cost bids?

A. No.

Q. Would you say from the fact that the government destination cost is identical, that they could not be figured from the varying shipping points separately?

A. Well, it would appear where there are identical prices,—

Q. (Interposing) Government destination cost.

A. Destination costs that are figured from some basing point.

Q. A common point, at any rate?

A. Well, I mean some common point. I referred to it as a basing point.

Q. And to the extent that they are, are they the actual land grant rates from the various mills?

A. Well, they are not actually. The only way they be-

come that is that they say, "You can deduct the land grant from each price." That is what I had in mind when I said that is what they amount to, but the sum total of it is that you pay more to the mill where you save anything on the land grant.

1791 Q. You mean that whatever is saved on the land grant rate goes over to the mill?

A. I mean where you have a scale like the one we had yesterday, running from $9,300 to $17,700, and the mill with $17,700 freight is willing to accept $27,000 for its cement and the mill whose freight was only $9,300 wants $36,000 or more for his cement, it would appear that wherever we are paying less freight we are paying more for the commodity.

Q. Now, Mr. Leisure gave you an illustration. He had a hypothetical case where he had you figure out by starting with a mill price of $2 and assuming a land grant rate of 25 cents and a commercial rate of 50 cents; do you remember that?

A. Yes.

Q. Pointing out that if you deducted the 50 cents commercial rate that the net to the mill then became $1.75; do you remember that?

A. I remember that.

Examiner Norwood: That was on the assumption that the bid was figured on the land grant rate.

Mr. Wooden: Yes. In other words, a destination cost of $2.25.

Examiner Norwood: Go ahead.

By Mr. Wooden:

1792 Q. Now, did you take into account, in your answer, whether or not that $2 price at the mill was a price at each bidder's mill, or a price as some basing point?

A. I was just taking that on the theory it was a price applicable to one particular bid of one particular bidder. I did not consider where he arrived at the $2.

Q. I see. It would make some difference whether it was a price at his mill or a price at a basing point, would it not?

A. Oh, yes.

Q. Now, Mr. Leisure asked you if, under the circumstances that he outlined in that hypothetical case, whether

the Government did not get the benefit of the land grant rate twice when it deducted 50 cents, which was the commercial rate, and I believe you were inclined to agree with him?

A. Well, on his hypothetical question, on the case that he expressed there, I agreed with him. I do not think that I could correctly—well, I would not want to attempt to say the Government got the land grant rate twice on that basis. His question went to the so-called Government control clause.

Q. In other words, his hypothetical case was based on the operation of that clause?

A. Yes.

Q. Well, I was going to ask you to explain where, under those circumstances, the Government got the benefit of the land grant rate twice.

1793 A. I do not think it actually did, that the Government would have gotten the benefit of the land grant rate twice. I have not observed any abstracts of bids and calculations where the Government has gotten allowance for freight twice.

Q. Do you see how it is possible for the Government to get the benefit of the land grant rate except in terms of what it pays to the railroads?

1794 A. It seems that is the only way to get the full benefit of it.

Q. Can you see how any payment made to the shipper is, in fact, obtaining the benefit of the land grant rate?

A. No, because I think the payment to the shipper should be independent of what the Government pays for freight under land grant acts.

Q. Well, I am going to give you a hypothetical case patterned after Mr. Leisure's case. Assume the $2 mill price, without for the moment stating whether it is a basing point price or what, the land grant rate assume to be 25 cents, making a government destination cost of $2.25; suppose the commercial rate is $1 instead of 50 cents, deduct that, leaving $1 net at the mill; would you say in that case that the government gets the benefit of the land grant rate four times?

A. No, I would not go that far.

Q. Well, if you get it twice in the case Mr. Leisure gave you why not four times in the case I gave you?

A. This $2, is that the mill price did you say?

Q. Yes.

Examiner Norwood: And the delivered price would be $2.25.

By Mr. Wooden:

Q. The government destination cost $2.25. De-
1795 duct $1 commercial rate instead of 50 cents.

A. Why deduct a dollar commercial from the mill price?

Q. Deduct a dollar from the destination price, that is right.

A. I thought you said mill price.

Examiner Norwood: That would leave $1.25.

By Mr. Wooden:

Q. That would leave $1.25, would it not?

A. You understand in these deduction cost prices the government does not actually deduct anything. The purpose of deducting is just a process of making the award. The fact that we deduct it and calculate how much it is going to figure out at the mill does not indicate that is what we are going to have to pay to the mill. If we would have to pay $2.25 destination cost price, and we will say we will deduct the commercial rate, that makes $1.25, and we figure then hypothetically that mill price is $1.25, but that does not mean that is what the mill gets, that is just the basis of making the award.

Q. I understand.

A. So the government is not taking four times the freight, or twice the freight from anybody, it is just a question of making a basis of the award.

Q. However, it might be interpreted, the fact remains,
does it not, that would give warning in advance as to
1796 just what you were going to do, so that the price made at the mill could be adjusted accordingly?

A. That is right.

Q. The $2 price, or whatever the price at the mill was, was made with the knowledge that the government proposes to deduct the commercial rate?

A. That is correct.

Q. Suppose we take another hypothetical case, suppose the mill price was $2 and the land grant rate was 25 cents, I will say both the land grant rate and the special rate were 25 cents, making $2.25 government destination cost; suppose the commercial rate were $2; then what would

the situation be as to whether the government had taken more than the land grant rate?

Mr. Leisure: Eight times.

1797 Mr. Wooden: I think it would be infinity, would it not, almost?

Mr. Leisure: Well, it is mathematical, at any rate.

By Mr. Wooden:

Q. In other words, there would not be anything left for the mill at all?

A. The mill would probably be paying us to take the cement away.

Mr. Leisure: I hope you will not put ideas in the heads of the Government on cement, Mr. Wooden.

Mr. Wooden: I am just concerned now with certain ideas that you put in the head of the witness.

By Mr. Wooden:

Q. Can you tell me whether or not, in the case of the Bonneville Dam letting, that there were certain special rates put into effect by the Northern Pacific that were lower than the land grant rates?

A. I do not recall. I have a recollection some special rates were in effect, but I do not know what they were.

Q. Mr. Leisure, in his questions about his hypothetical case, assumed that that $2 was necessary to cover the mill's overhead, and when he got through with his conclusion, after your answers, that a deduction of 50 cents in that case would have resulted in a loss to the mill.

1798 Do you know anything about mill overhead or losses on any such hypothetical basis as that?

A. I know nothing about any losses on cement.

Q. Now, Mr. Leisure also asked you something about the market place and destination place, where the cement was to be used being the market place. If that, in your estimation, is the market place why you tried to buy somewhere else than the market place, namely, f.o.b. mills?

A. Well, we tried to buy f.o.b. mills so we could effect certain savings in freight costs which, if we bought locally at destination, we would not be able to secure.

Q. Well, how can you buy anywhere except in the market place, wherever that may be?

A. Well, I do not believe I recall Mr. Leisure's question just now, but I do not know just any case where we

have restricted our purchases to the vicinity of the work. We buy from any point we can.

Q. As a matter of fact, you want to buy f.o.b. mill, don't you?

A. Well, we do, yes.

Q. And you take title at the mill on a Government bill of lading, is that correct?

A. That is correct.

Q. Do you take title to it at some place other than the market place?

1799 A. Well, I think the market place covers a wide area.

Mr. Wooden: While, as a matter of fact, we are in a field here that only an expert economist can deal with, but since the other side went into it to some extent I thought I would do so also. That is all.

By Examiner Norwood:

Q. Well, suppose that the commercial freight were figured in at destination cost, suppose the price at the mill were $2 and the commercial rate of 50 cents were added, making $2.50, and the Government was allowed to deduct then a special rate, or a land grant rate of 25 cents, what result would that have?

A. Well, the way it should be figured is we should be allowed to deduct the commercial rate and add the land grant rate.

Q. Well, suppose it were just the other way, would the Government lose on that?

A. It might.

Q. Say the land grant rate were 25 cents instead of—

A. (Interrupting) If you knew the land grant rate was 25 cents, the Government would not lose anything.

Q. Take Mr. Zimmerman's same figures—

Mr. Wooden (Interrupting): Mr. Leisure's example.

Examiner Norwood: I thought it was Mr. Zimmerman.

1800 By Examiner Norwood:

Q. Anyway, where there is a double deduction, or a claimed double deduction, if it were just the other way then the final figure would be $2.25 instead of $1.75; who would lose there?

A. There isn't anyone who would lose there, because of the figures you specified. We have a commercial

freight, and say the land grant rate was half of that, and by taking the rate of 25 cents we would only, in effect, be paying the land grant rate.

Q. Well, suppose the commercial rate were the higher rate, the mill price is $2 and the higher rate added making it $2.50, and say, for illustration, the land grant rate were 25 cents, making $2.25; in the first illustration 50 cents was deducted, that is, the commercial rate was deducted, leaving $1.75 to the mill, is that not correct?

A. Yes.

Q. Now this other way you add your 50 cents, the commercial rate, making $2.50, and then the Government is allowed to deduct 25 cents, that is the lowest rate, which makes $2.25 that the Government must pay?

A. That is correct.

Q. Does it lose anything there? Does the Government lose anything on that process, reversing the process?

A. No, I do not think the Government loses any-
1801 thing there. They only pay the land grant rate, they are not paying the commercial, or any portion of it.

Q. Would it gain anything?

A. No, I do not think it would gain anything.

1802 By Mr. Wooden:

Q. But, Mr. Rice, the government does not lose on the land grant rate, but in that particular case does not it pay more on the bill for cement?

A. Are you asking on the assumption it is going to pay $2.25 to the mill?

Q. Yes.

A. If it pays more than $2 to the mill, it would be paying more for the cement.

Examiner Norwood: Would it, in that case, be more?

The Witness: It would here, if you paid the $2.25 you would be paying 25 cents more to the mill, and then turn around and have to pay your land grant rate to the railroad.

Examiner Norwood: Reverse that process and the government would be only paying $1.75 at the mill, would it not?

The Witness: Yes, it would.

Recross-Examination by Mr. Leisure.

Q. But on my hypothetical case that his Honor just asked you about, Mr. Rice, if the mill had a price base of $2 and then you deducted a higher rate than it included in its final bid, in its competitive bid, that would cut it
1803 down, as shown in our example, to $1.75 at the mill, is that not so?

Examiner Norwood: Well, since the government is specifying that they should adopt the commercial rate, is there anything in the way of the mills basing the commercial cost on the commercial rate?

By Mr. Leisure:

Q. Will you answer that? There never is any difficulty at all when you do not have a land grant rate; where they deduct the commercial rate, then you do not have this difficulty at all, is that not so, Mr. Rice, in answer to the Examiner's question?

1804 A. We do not have any difficulty if there is no land grant rate or no special rate.

Q. So that when the seller knows you are deducting the commercial rate and he includes that in his bid, there is no difficulty with anyone, is there?

A. How does he know of them? As I understand it, these special rates are filed with the Government before opening.

Q. I was talking about the commercial rate.

A. Oh, I think you are right on that, probably. These hypothetical questions with regard to freight are a little bit out of my bailiwick.

Q. On Mr. Wooden's last question that these were properly in the field of economics, a man does not have to be an economist to know where the War Department figures the destination cost in making a bid, does he?

A. Just what do you mean? Destination cost? What do you mean?

Q. You do not have to be an economist to know that the Government in figuring out who the successful bidder will be, figures at the point of destination rather than somewhere else?

A. Oh, no. We have got to figure that.

Q. That does not take an economist to determine that, does it?

A. No.

1805 Q. And it is a fact, isn't it, that you figure your cost to you laid down at the point of destination? That is the way you determine who the lowest bidder is, isn't that so?

A. That is the cost we are interested in knowing, yes.

Q. When Mr. Wooden used the term that you try to buy f.o.b., is it a fact that you try to buy f.o.b. mill, or that you merely ask for invitations f.o.b. mill, and then really buy on the basis of what it costs you?

A. Well, I think the statement that we buy f.o.b. mill is correct, because the property is ours at the mill.

Q. Well, now, let us test that. That is where title passes, I agree with you.

A. That is right.

Q. So that if anything happens—

A. (Interrupting:) If there is any loss.

Q. If there is any loss in transit or a question of insurance, title passes at the mill?

A. Yes.

Q. But let us suppose that you got a quotation from the mill and that was higher than some other mills—let us take two mills, and one mill is higher, mill No. 2 is higher at the mill than mill No. 1, but Mill No. 2 is cheaper at the point of destination than mill No. 1. Which contract do you execute?

A. We are going to take the one that is cheaper
1806 at destination.

Q. That is right. So the sale takes place at the market place of destination, doesn't it?

A. I think the sale is consummated at the point where we take title.

Q. Then at least you will admit this. You do not buy at the mill because in that case you did not buy at the place where the mill was the lowest, isn't that so?

A. In that particular case, having bought it at destination, that would probably be what you call the market place, but we only figure the total delivered cost, because that is what we are governed by, what the article is going to cost delivered to the point where it is required.

Q. You say you did it in that case. Can you give me any instance where the Government figures the final cost not at destination, but figures it at the mill? Give me one single instance where it determines the lowest bidder any place else except at destination cost?

A. No, we consider the transportation cost in making the awards.

Q. Do you consider those elements, but in making your award, the determination of the lowest cost to you is figured at destination, is it not?

A. That is correct.

1807 Examiner Norwood: Well, in the case of a tie, then you follow that policy of taking the mill farthest away; there it would be different, would it not?

The Witness: We made the award in that particular case I think that you have reference to—

Examiner Norwood: (Interposing) That is on the basis of the lowest mill cost, isn't it?

The Witness: That was only put in the specifications there as a statement as to how we were going to make the award. It is only a condition of the award; it has no reflection of the amount that we spend. We spend just as much under that as if we had taken the mill five hundred miles away.

By Mr. Leisure:

Q. Precisely. And in answer to his Honor's question, under the statute you would not be allowed to award to the lowest mill, would you? You would have to award to the mill that was lowest to you under the statutes, wouldn't you?

A. Within certain restrictions, yes.

Examiner Norwood: That is in the case there was no tie?

The Witness: If everything was equal.

By Mr. Leisure:

Q. In these examples that Mr. Wooden gave you of where the government had a saving not of 25 cents,

1808 but rather up to as much as $2 on land grant rates, or eight times, if you were the mill submitting a competitive bid, you would have to figure what those freight rates were before you could determine whether or not you could submit a competitive bid, would you not?

A. Well, you would have to—

Q. (Interposing): He gave you an example of $2 for a freight rate.

A. You would have to know something about your freight, yes.

1809 Q. In other words, if you were in California, you could not compete and ship to a destination in New York?

A. Not unless you had a sufficient amount of money included in the bid price for absorbing the freight.

Q. Well, in the example he gave you, the freight would entirely consume the cost per barrel for the cement, so just without looking at it from the Government's standpoint for a moment, and looking at it from the shipper's standpoint, you would have to determine in that way in order to determine whether to submit a bid at all, wouldn't you?

A. That is right.

Q. And if the freight was too high, you might determine that you would not bid, isn't that so?

A. That is correct.

Q. Now, whether you used the land grant rate of 25 cents in making up your bid or whether you used the Government's proposal of adding 50 cents, you could not sell your cement at the point of destination for any more than your competitors were selling at destination, could you? To the Government?

A. Under these destination cost prices, there is a difference.

Q. Yes, there may be a difference, but I am talking about the successful bidder. Would the Government pay a penny more to one bidder than it would to another?

1810 A. Are you speaking about it at destination?

Q. Yes, indeed. The market place.

A. We would not pay any more under delivered bids to one bidder than we would to another.

Q. You would take the lowest bid? You would not pay one bidder more than you would pay another? You would take the lowest, would you not?

A. Yes.

Q. And the man who submitted the bid, would of course realize that it could not submit a bid a penny higher than his competitors and expect it to be successful?

A. Are you speaking now of delivered basis? Are you speaking on a delivered basis now?

Q. Yes, I am.

A. Yes.

Q. There is no secret about where the Government figures its destination cost, is there, or how it figures its destination cost? It is all in the specifications?

A. That is correct.

Q. Now, about these railroads and the division rates not being known generally. What are the division rates? Will you explain what you mean by that?

A. Before I came over here this morning, I felt that I might better consult someone who is more expert on this proposition than I. I wanted to be sure that I had
1811 the right picture of what is known as division rates.

Q. Who was that?

A. I consulted the Chief Traffic Rate Clerk in the Quartermaster General's Office. He has been there for years and is considered to be an expert.

Q. What is his name?

A. Wright. We took, for instance, after looking at one of these maps showing the land grant rates, we took a hypothetical case--

Q. (Interrupting.) Are you telling me about division rates, Mr. Rice, or are you telling me something else, that you have in your mind?

A. We can take this off the record if you don't want it on. I am showing you how this is figured—

Q. (Interrupting.) I would rather have my question answered, then Mr. Wooden can bring it out if he wishes. I want to know what you mean by division rates.

A. I don't know whether I know enough about division rates without going through this. It is a breakdown of the total freight between the railroads that carry it across their various lines between given points.

Q. And was that what you meant is not known generally but just known between themselves and the Government?

A. Well, it is not known generally as to how this breakdown is figured. The line taking the traffic on first
1812 on a through rate—as to how that is broken down between roads—that is what I understand it to be.

1813 Q. When you said it was not known generally, you did not want the Examiner to understand that the traffic managers of the big shippers and the railroad are not able to get together with the railroads and figure out the division rates?

A. Those division freight rates, as far as I know, are not known to anybody except the railroads and possibly the government for the purpose of calculating this land grant.

Q. Are you talking about some special land grant rate?

That is why I asked you what you meant by division rates. Are you talking about the regular division rates, the traffic rates? That is why I asked you what you meant in the beginning.

A. I am talking about the division rates that involve the haul between two points within which there is a certain land grant item. The rest of it is not land grant.

Q. That is what I wanted to get at.

A. I say, as to that, the break down across that haul is not known to anybody but the railroads and the government.

Q. Did you want the Examiner with respect to that to understand that a large shipper who has its own traffic manager and is considering whether or not it will ship over this road which has a land grant rate, or a competing road, cannot find out what it will cost him to ship from that division manager, what the freight rate will be, even though it includes a land grant rate? Do you want the Examiner to understand that that is kept secret from a prospective shipper?

1814 A. I intend to bring out the point that between these two given points, the Illinois Central and the Mobile & Ohio, if they are the two railroads, as to which of these two railroads gets the most, or on what percentage the total tariff is divided, that is not known publicly.

Q. That is, between the government and the railroads?

A. Yes.

Q. I have no quarrel with that.

A. That process does affect the amount of the land grant rate.

Examiner Norwood: Could agreements between these carriers be entered into in a way that would make the government pay more or less, and lose some of its advantage from this land grant rate over a road?

The Witness: I don't know whether I am expert enough on that subject to answer it without going into it a little further, but I understand that the road which initiates the shipment might receive a larger cut of the total tariff. If that were the case and it was a nonland grant road that started it, that would mean that for the mileage of the land grant, there would be less there involved. The Secretary of War has fixed the land grant rate at 50 percent under a statute in 1924.

Examiner Norwood: Does the Interstate Commerce Commission pass on these division contracts?

1815 The Witness: I cannot answer that.

By Mr. Leisure:

Q. Would you explain what you meant when you said the land grant rates could be changed by the Secretary of War? Do you mean that the contractural relationships between the railroads and the government can be changed by the Secretary of War?

A. The Act of June 7, 1924, 43 Ste. 486 states:

"Provided that hereafter payments shall be made at such rates as the Secretary of War shall deem just and reasonable and shall not exceed 50 percent of the full amount of compensation computed on the basis of the tariff or lower special rates for like transportation performed for the public at large for the transportation of property or troops of the United States over any railroad which under land grant acts was aided in construction by grants of land, on condition that said railroad shall be and remain a public highway for the use of the United States."

I think that is quoted here to give you the basis of my answer.

Q. Is that the basis for your statement, Mr. Rice, that the Secretary of War can change the land grant rates?

A. That is correct.

Q. You also said it could be changed by the railroads. Will you explain to the Examiner what you meant by that?

1816 A. What I mean by that is that any change in division agreements of this tariff would have the effect of changing it, because if there is a smaller proportion of the total tariff that went to the railroad having the land grant end, 50 percent of that would be less than if they get the largest cut.

Q. In other words, what you meant to say is that the land grant freight rates can be changed from time to time just as the commercial rates are changed?

A. They are subject to change, yes.

Examiner Norwood: Then let me ask my original question. The railroads could make these agreements between themselves in a way that would lessen the government's advantage in the matter of freight rates?

By Mr. Leisure:

Q. Do you understand that to be so, that they could lessen the government's advantage without the consent of the government and without the consent of the railroads?

A. It is my understanding that they could—that it would have that effect.

Q. But it would be a change in the commercial rates on those lines rather than any change in the land grant rates which were given to the government in the beginning on its contract?

A. I don't think it would change the commercial rate. It might change it in so far as inter-companies are
1817 concerned. As I understand it, it is an agreement between the two companies carrying the haul as to which will receive a certain share and what is left for the other one.

Mr. Leisure: Well, I have no quarrel with that.

Mr. Zimmerman: There were some documents that I asked for yesterday. They were Commission's Exhibits 165, 168, and 166, of which I think I asked you to produce the originals.

The Witness: I regret to say that I have not had a moment to look for them.

Mr. Zimmerman: I can understand that perfectly if you wanted to get any rest last night, but may we understand, Mr. Wooden, that a reasonable time should be allowed, and then that you will come back with them a little later? Then at the same time I might go into these f. o. b. mill bids for Marquette unless you have those with you. Did you manage to find those?

The Witness: I have not looked for a thing. I did bring over this Huron contract—or was it Mr. Smith that wanted that?

Mr. Zimmerman: I think Mr. Smith wanted that. Then we can postpone it—to any particular day would you say?

Mr. Wooden: Any time is agreeable to me.

Examiner Norwood: Off the record.

(Discussion off the record.)

1818 Mr. Leisure: I had not finished my cross-examination.

1819 *Cross-Examination by Mr. Leisure (Continued).*

Q. Mr. Rice, on the control clauses that Mr. Wooden was just asking you about, I think you said the so-called Government control clause is simply a condition imposed by the buyer; is that right?

A. It is a basis upon which we will make the award.

Q. Now, isn't the clause that we read that I described as the respondents' control clause, doesn't that do the same thing? A condition proposed, at least, by the seller?

A. It is a condition proposed by the seller.

Q. One other thing. You mentioned a hypothetical case for Mr. Wooden, and apparently there is some dispute as to whether the bidder has built up his bid by including the commercial rate or the land grant rate. The Examiner asked you some questions on the assumption that a bid of destination cost included the commercial rate. In most of these lettings, each bidder put in two bids, a destination price and destination cost with the control clause that you have been testifying to?

A. That is my recollection.

Q. On these cases, the destination cost figure is always lower than the destination price, isn't it?

A. Yes; that is what I have observed. That is right.

Q. It is obvious that the destination price in-
1820 cluded a commercial rate, therefore isn't it apparent that the destination cost included the land grant rate?

A. Well, I don't know that I can say that. It is apparent that it included—

Q. (Interrupting.) Some rate lower than the commercial?

A. Some rate lower or else there was a cut in the proceeds to the mill, or something. There are some basis for the deduction.

Mr. Leisure: That is all.

Recross Examination by Mr. Zimmerman.

Q. I understood you to say, Mr. Rice, that under the present system of bidding, the Government made no saving at all on the land grant rates. Did you really mean that?

A. Are you speaking about these destination cost prices?

Q. Yes.

A. I say that it makes no real saving, because no matter what mill it buys from, the net cost is the same.

Q. Well, just for illustration—

A. (Interrupting.) Just a moment.

Q. Quite so. Finish your answer.

A. This statement is based on the average, the general run of these abstract bids, not any particular isolated case.

Q. Well, there is no magic in merely having different destination costs from the several bidders? That
1821 would not necessarily mean that you were getting a fairer price because the destination costs happen to differ?

A. My contention on that is that a mill closer by should deliver for less money and come back to the old theory based on some efficiency of plant and manufacturing facilities.

Q. Well, let us see about this saving. Take for just an illustration one of the exhibits that was produced here by the Government, Commission's Exhibit 157. I am using that for illustration only because it is as good as any other and one that we have talked about a good deal. That is the one where the letting was made to the Consolidated Cement Corporation, Bidder No. 12. You will observe the net amount which they will receive there on the destination cost bid is $27,284.76. I read that correctly, do I not?

A. That is correct.

Q. Their f. o. b. cars Greenville, Mississippi, where they used the commercial rate was $50,175, wasn't it?

A. That is correct.

Q. The difference you can easily figure—check it if you like—but I figured it $22,890.24, a saving to the Government by the use of the destination cost bid in which the land grant rate figured that much. Is that correct, substantially?

A. Would you repeat that saving?

Q. Yes, say substantially $22,890.

A. No, I do not think we saved that, because we
1822 would have to pay out $17,715 in freight.

Q. And how much do you save? You are right

about that. Your saving is not so large, but it is several thousand dollars, isn't it?

A. Well, there is a reduction of the difference there. There is a difference of about $5,175.

Q. That is the saving?

A. Yes.

Q. And that occurs because of the use by the bidder of the land grant rate in figuring the destination cost?

A. That is right.

Q. There are some bidders that on a given invitation to bid, that is, some that are invited to bid, are not located on these land grant railroads, are they?

A. I understand there are some mills that are not located on them.

Q. That would give such a shipper or bidder some basis of complaint of lack of equality with a rival shipper that did happen to be located on a road where the Government gets the land grant rate, wouldn't it?

A. I don't think that would give them any basis for complaint.

Q. Well, you take care of that by offering in the specification to allow them to equalize freights; you suggest that in your invitations?

1823 A. We allow them to equalize any savings in land grant rates.

Q. You suggest in the specification that they may equalize freights?

A. That is correct.

Q. That is exactly what these several bidders did as shown in this Commission's Exhibit 157, isn't it, on those destination prices? The net amounts at the mill are all different, so that it appears that they have adjusted their prices so as to equalize the difference in the freights, isn't that correct?

A. I would not say that.

Q. All right. If all the mills had to pay exactly the same f. o. b. price and you had used the actual freight in figuring all of the bids, whether you used commercial or land grant, you would get a different delivered price or destination cost in each instance, wouldn't you?

A. That might be so.

Q. Well, it would be so, wouldn't it?

A. Yes, probably.

Q. Well, that would not have anything to do with

whether you were getting a fair price or an unfair price, would it? It would not have any bearing on it at all?

A. No.

Q. You referred to the control clause of the re-
1824 spondent companies as differing from paragraph 6 which has been referred to as characterizing one of the clauses put in the specifications as a Government control clause. In this particular instance, as an illustration, on Commission's Exhibit 157, you had the Paragraph 6 in the specifications, didn't you, in the invitation?

A. It is my recollection that it was.

Q. But you found that you could make more saving by using the lowest f. o. b. mill or shipping point bid that was received from the bidders rather than applying Paragraph 6, did you not?

A. That is correct.

Q. So there it was an advantage to the Government to accept the use of the control clause by the respondent mills rather than to use the Government control clause which we referred to as Paragraph 6?

A. In that particular case it was. We frequently make awards on some basis other than that of advertisement.

Mr. Zimmerman: I think until we get the other exhibits, that will be all. Thank you very much.

Examiner Norwood: Any further questions?

Mr. Wooden: Yes, I would like to get through with the witness and ask two or three questions prompted by Mr. Leisure's last cross-examination.

1825 *Redirect Examination by Mr. Wooden.*

Q. Mr. Leisure asked you, Mr. Rice, or assumed that the Government would not pay more to one bidder than to another delivered. And you agreed to that. He did not ask you, I noticed, whether the Government would pay less to one bidder than to another.

A. Well, we will always pay less.

Q. That is what you are trying to do?

Mr. Leisure: That is apparent, isn't it?

Mr. Wooden: Yes.

By Mr. Wooden:

Q. You have sometimes succeeded, have you not, in getting a lower delivered cost from one bidder than from another?

A. That is right.

Q. Now, I think you agreed that the Government wanted to know the delivered cost, the lowest delivered cost. Wouldn't you say that every buyer wants to now what the lowest delivered cost to him is at the place that he wants to use the material?

A. I should think that that would be a most important consideration.

1826 Q. Is not the whole issue over who should figure that delivered cost and how?

A. That is right.

Q. You want to do your own figuring, is that not so?

A. Well, we feel we have better facilities for doing that figuring.

Q. If, as Mr. Leisure suggests in his questions, the government should be concerned only with its delivered cost as figured by the mills and not as figured by the government, why should not the mills be concerned only with their mill net and quote f. o. b. mills?

A. Well, I do not know, because, after all, all they get is what is figured at the mill. They do not receive anything from the railroads.

Q. If you were to accept the theory that all delivered prices are naturally and necessarily identical because of competition, would you then be in the position where you might just as well accept the inevitable and quit all this effort to get mill prices, or to get competitive bids?

A. No, there would not be any difference. What we might save at the mill one way we would pay to the railroads in another.

Q. Could you not save the advertisement and lettings, and going through the motions of ascertaining which bid is lowest, and all that, if you simply knew that perfect
1827 competition would give you an identical delivered price any way?

A. If we were assured there was no competition we might just as well buy from the fellow around the corner every time.

Mr. Wooden: That is all.

Mr. Leisure: On that point just one question arises.

By Mr. Leisure:

Q. Mr. Wooden just asked you if the whole issue was not as to who should do the figuring.

Mr. Wooden: And how.

By Mr. Leisure:

Q. (Continuing). And how. Now quite apart from that, if you were a cement manufacturer would not you want to figure a competitive bid where you knew your purchaser was figuring a price where he was making up the amount of the cost? Suppose you were the cement man would you want to figure it out somewhere where it would not mean anything or would you want to figure it out at the market place where you knew the seller was making the determination?

A. They should bid the mill price and offer to equalize within certain competition.

Examiner Norwood: I think we are just going into argument on both sides on this now. The witness has done pretty well.

Mr. Leisure: I will not question him any further.

1828 Mr. Wooden: I will offer at this time this exhibit that was marked for identification and a photostatic copy of which was produced by the witness this morning.

Mr. Zimmerman: This is the Huron contract?

Mr. Wooden: This is the Huron contract. It is Commission's Exhibit 329-A to Z.

The Witness: It has already been marked but I just took the original back and photostated it.

Mr. Zimmerman: This is merely a substitution?

Examiner Norwood: Yes, it is merely a substitution.

W. E. HAYGHE, called as a witness on behalf of the Commission, being first duly sworn, testified as follows:

Direct Examination by Mr. Wooden.

I am at present the chief of the traffic section, Procurement Division, Treasury Department, and have been
1829 in that position for approximately four years. Prior to that time I was chief of the rail routing division of the Federal Traffic Board for approximately five years, 1928 to 1933. I have not exactly had traffic experience in the employ of any railroad. I worked in the local freight station in the Baltimore & Ohio in Washington and in the general office of the Southern Railway in Washington. The nature and scope of my duties in my present position consists of the computation of land grant rates for use of

government establishments for various purposes including the awarding of bids and payment of transportation charges on carriers' account; routing of carload traffic of all government establishments with the exception of the military.

Q. Now, you spoke of the Procurement Division of the Treasury Department. Will you explain just what the functions of the Procurement Division are?

A. They are varied. Generally they are the purchasing of materials for various government establishments, and with respect to the emergency program the pur-
1830 chasing of all materials, not directly here in Washington but through our state offices throughout the country.

Q. Does that include the purchasing of cement?

A. Yes, sir.

Q. For what agencies of the government has the Procurement Division of the Treasury made cement purchases?

A. Works Progress Administration, the Resettlement Administration now the Farm Securities Administration. I believe I am not qualified here to state all of these others, but to some extent I think the Soil Conservation of Agriculture and National Parks of the Interior, but I am not positive of those last two.

Q. Now what has been the relation of the Procurement of the Treasury to the purchase of cement for the so-called emergency program? Will you explain what the emergency program is?

A. It was the program established under the Emergency Relief Act, I think 1935 was the date, for the purpose of performing the work of the Works Progress Administration throughout the country W.P.A. projects, building of bridges, roadways, works of that sort generally.

Q. Has the purchase of cement for W.P.A. projects had any connection with projects that were jointly financed by federal and state or local governments?

A. Yes, it has.

1831 Q. Will you explain just how that has been worked out?

A. I am afraid I am not qualified to answer that.

Q. Can you give us any idea of the relative importance of cement purchases on projects that were jointly financed by the state and federal governments and the total?

A. No, I could not.

Q. Can you state what the method is of purchasing cement for W. P. A. projects?

A. Well, the state procurement offices issue invitations to bid, receive the bids and evaluate them and make awards just as they would for any other material.

Q. Are bids solicited from cement mills?

A. Yes, sir, they are.

Q. Are they also solicited from dealers?

A. They are.

Q. Can you state to what extent your Procurement Division has been able to buy cement direct from the mills and to what extent it has bought through dealers?

A. To the greatest extent our dealings are through the dealers. In some few excepted states bids were received from manufacturers, principally in Florida and in Alabama in the South, and we receive bids from dealers in some of the western states that I cannot at the moment recall.

Q. From dealers in western states?

A. From the manufacturers. I cannot recall the
1832 names of them, but they are a matter of record in material which we have available. Generally speaking, the bids are confined to dealers.

Q. Do you know, in general, to what extent the cement purchased through dealers was actually shipped direct from the mills to the project?

A. Off the record, may I answer from information communicated to me?

Q. Yes.

Mr. Zimmerman: That would be hearsay, Mr. Examiner.

Mr. Leisure: If he knows of his own knowledge he can state, but I do not want to get something on the record that he does not know about.

Examiner Norwood: Answer from your own knowledge.

The Witness: From my own knowledge, I could not say.

By Mr. Wooden:

Q. Well, do you have knowledge that comes to me from the people in your organization on which you predicate your own official action with regard to such matters?

A. Yes, sir, the state procurement offices.

1834 A. It has come to my knowledge through correspondence with our State Procurement Officer for the State of Georgia that in many cases, in response to bids and award of contract to a dealer, the cement has been shipped direct from the mills to the project involved.

By Mr. Wooden:

Q. Can you give us some idea, Mr. Hayghe, of the total quantities of cement that have been purchased through the Procurement Division of the Treasury Department in the last year or two?

A. For a definite—

Mr. Leisure (Interrupting): That is objected to.

Examiner Norwood: On what grounds?

Mr. Leisure: I thought the witness had already started to answer and I did not want to interrupt him.

1835 I was going to move to strike after had finished.

A. For a definite period from July 1, 1935, to November 30, 1936, the total purchases of cement through the State Procurement Offices was approximately 15,000,000 barrels.

Mr. Leisure: The point of my objection was, Your Honor, that the total purchases of cement is not material to any of the issues in this case. I do not know why we should go into it at this time.

Mr. Wooden: Well, Your Honor, it has a great deal to do in regard to the importance of this witness' testimony.

Examiner Norwood: Motion denied.

Mr. Wooden: The hearing has been touched to some extent with the purchase of 15,000,000 barrels of cement in the last year and a half.

Examiner Norwood: He can cover that. Motion denied.

By Mr. Wooden:

Q. You mentioned the date, November 30, 1936, as the end of that period.

A. Pardon me. I would like to make a correction. 1937.

Q. Have you seen a compilation which shows how that total was divided among the States?

A. Yes, sir.

1836 Q. Looking at this letter from your Procurement Division, will you give us the total of purchases by States? (Handing document to the witness)?

A. By States?

Q. During that same period that you have already mentioned.

A. Alabama, 289,074 barrels.

Mr. Leisure: May I ask him a question about that?

Examiner Norwood: Certainly.

By Mr. Leisure:

Q. Was that prepared under your supervision so that you know the figures are correct?

A. It was prepared by me.

Q. What was the data you took that from?

A. Beg pardon?

Q. How did you secure the figures? What is the basic data it came from?

A. The basis is a circular letter written through the State Procurement Offices under date of December 8th requesting their advice as to their total purchases of cement during this period of time.

Mr. Leisure: Very good.

A. (Continuing) Alabama, 289,074.
Arizona, 110,263½ barrels.
Arkansas, 151,699¾ barrels.
California is divided into San Francisco territory and Los Angeles.
1837 For San Francisco, 418,423¾.
Los Angeles, 539,660 barrels.
Colorado, 184,969½.
Connecticut, 103,220.
Delaware, 7686 barrels.
Florida, 161,657.
Georgia, 204,127.
Idaho, 44,395.
Illinois, 926,141.
Indiana, 155,427.
Iowa, 193,354.
Kansas, 323,755.
Kentucky, 431,806.
Louisiana, 459,469.
Maine, 20,567.
1838 Maryland, 298,150¼.
Massachusetts, 163,512.
Michigan, 967,777.
Minnesota, 264,181½.
Mississippi, 199,053.
Missouri, 451,231.
Montana, 31,781.
Nebraska, 209,421.
Nevada, 1896½.
New Hampshire, 17,304½.

New Jersey, 491,656.
New Mexico, 38,439.
New York, 3,330,885.
North Carolina, 131,150½.
North Dakota, 54,420.
Ohio, 1,277,806.
Oklahoma, 884,955¾.
Oregon, 28,215.
Pennsylvania, 205,208½.
Rhode Island, 1799¾.
South Carolina, 83,903.
South Dakota, 77,796.
Tennessee, 153,403.
Texas, 378,399½.
Utah, 92,197.
1839 Vermont, 1110.
Virginia, 97,686.
Washington State, 63,137.
West Virginia, 129,265.
Wisconsin, 304,957.
Wyoming, 7987½.

By Mr. Wooden:

Q. Was the District of Columbia in there?

A. No, sir. We have no state procurement officer for the District of Columbia.

1840 Q. Mr. Hayghe, will you give us some idea of the character of the projects for which cement is purchased through the Procurement Division?

A. Building of bridges, road work principally, as a matter of fact, most anything that can be made of cement, I imagine, has more or less figured into the emergency relief work.

Q. Any buildings?

A. To the best of my knowledge, no.

Q. Sewer construction, and such as that?

A. Probably, yes, sir. I can not speak definitely on that, but it very probably entered into it.

Q. Any such things as swimming pools?

A. I am afraid I can not answer definitely on those. I am not personally aware of that.

Q. When you buy cement direct from the mill, do you ship on Government bill of lading?

1841 A. Yes, sir, that has been the practice.

Q. Taking title to the cement at the mill?

A. Taking title at the mill.

Q. What is your policy with regard to taking advantage of land grant rates, where they are available?

A. Under the method used—wait a minute. We have generally accepted these destination cost prices, deducting the land grant rate and moving it on Government bills of lading.

Q. Do the mills, when bidding direct, attach a clause to the effect that you shall deduct whichever is the lower rate, land grant or commercial?

A. In connection with the Government cost at destination they do. The land grant rate, commercial rate or special rate, whichever may be lower.

Examiner Norwood: Is that a Government provision?

The Witness: No, sir, that is a rider attached by the bidders.

By Mr. Wooden:

Q. Do you ask for bids f.o.b. mill?

A. We do, both f.o.b. mill and destination.

Q. Do you get bids strictly f.o.b. mill?

A. In some cases we have, in the States that I recalled a bit ago, Florida and Alabama.

Q. Now, you buy direct there?

A. From the manufacturer.

1842 Q. Are you sure that you get any straight f.o.b. mill prices there or government destination cost?

A. Not at the moment, we do not. At one time, to the best of my recollection, they did receive f.o.b. mill prices, back several years ago, but not of a recent occurrence.

Q. More recently, in the last several years, is it or is it not your experience that you get a government destination cost?

A. Exclusively, yes, sir, when the mills bid.

Q. Can you fix the time approximately when it was that you did get strictly f.o.b. mill quotations?

A. No, I could not.

Q. Would you say several years ago?

A. Several years ago, I would say.

Q. Now, you gave these figures by states of purchases since July, 1935?

A. Yes, sir.

Q. Were you connected with the purchase of cement prior to that time in any capacity?

A. Only to the extent of computing freight rates in connection with the awards.

Q. Was the date, July 1, 1935, the approximate date on which the so-called emergency relief legislation went into effect?

A. It was approximate date of the establishment
1843 of the state procurement offices throughout the country. I am not aware of the exact date of the emergency relief program.

Q. Had large purchases of cement been made through the Procurement Division prior to July, 1935?

A. No, not in connection with the relief. The Procurement Division, since it came into being, of course dealt in cement to some extent, in the building of public buildings. Usually the government does not directly buy materials for that purpose, but in some cases they did.

Q. Well, you mean ordinarily the contractors buy in such cases?

A. Yes, sir, contracts are let for the building complete.

Q. Do you know whether or not it is the custom for regular permanent branches of the government to buy cement direct from the mills?

A. Permanent branches did you say?

Q. Yes.

A. With regard to reclamation projects the contracts are let direct with the mills, and it is my understanding they receive direct prices f.o.b. mill on such projects.

Q. How is it on W. P. A. purchases such a large proportion as I understand it with the exception of one or two states, is bought by the Procurement Division through the dealers instead of direct from the mills?

A. Because of the failure of the mills to submit
1844 bids in response to invitations.

Q. Do you have any knowledge as to why they refuse to submit bids?

Mr. Leisure: Now, I submit—

The Witness: (Interposing) No personal knowledge.

1845 Q. When you buy cement through dealers and the cement is shipped direct from the mill over a land grant road, are you able to take advantage of the land grant rate in such cases?

A. No, sir.

Examiner Norwood: Do you have to do with the
1846 letting of the bids or the payment for the cement?

The witness: I do not, no, sir.

Examiner Norwood: Can you answer that of your own knowledge?

The Witness: I can answer the general question of my own knowledge. May I answer it in this fashion? Unless the Government can establish title to the property at the point of shipment, the Government is not entitled to any land grant deduction, because of the wording of the Land Grant Laws, that it will apply only on property or troops of the United States. So it must have title at the point of shipment in order to receive the benefit of it.

By Mr. Wooden:

Q. If you could buy that same cement from the mill direct and take title to it at the mill, you would then be able to take advantage of the land grant rate?

A. We could.

Q. Did the Procurement Division or any of its officers endeavor to meet that situation by a substitution of a Government bill of lading for a commercial bill of lading?

A. According to the records in the State of Georgia, that was done, yes, sir.

1847 Q. What was the outcome?

A. They moved a few shipments under government bill of lading, the dealers having agreed to a deduction of the commercial charge from their price, the commercial freight charge.

Q. And then what happened? You say they moved a few shipments that way?

A. The shipments moved under government bill of lading and we received the benefit of the land grant rate.

Q. You say a few purchases or shipments were moved that way. Then what happened?

A. That practice was stopped by a Procurement Division bulletin, for the reason that under the method pursued, there was no change in the terms of the contract, that is to say, they still remained f.o.b. destination, and due to certain other developments it was considered advisable to not endeavor to secure the benefit of land grant in that fashion, and that practice was stopped in—I don't know the exact date, but it was quite some time ago.

Q. I think the papers that I have will enable you to fill it out.

Examiner Norwood: That is in cases where dealers had bid on these smaller jobs?

The Witness: Yes, sir. There was no change in the terms of the contract. It still remained the same.

1848 By Mr. Wooden:

Q. So you came back to your original practice and condition whereby not being able to take title at the mill because the dealers were in between there and they were buying it and reselling it, you could not take advantage of the land grant rate on cement shipped from a mill over a land grant railroad?

A. We did not consider that we were legally entitled to it under those circumstances.

Q. But if you had been able to buy direct from the mill, then you could have taken advantage of it?

Mr. Leisure: I think we have been over that. The question was objectionable the first time and it is just as objectionable now. If there is that kind of evidence to be produced, the evidence should be brought here in proper form and not conclusions of this witness in general testimony of this kind.

Examiner Norwood: Objection overruled.

The Witness: Yes.

1849 The witness identified Com. Ex. 330 A to J as certified copies of correspondence between the State Procurement Office for the State of Georgia and the Procurement Division in Washington. They relate to the matter "that we have just been discussing", the substitution of government bills of lading for commercial bills.

Mr. Wooden: I offer them for the record, your Honor, as communications passing in the ordinary course of business between the Procurement Division of the Treasury here and the field or state officer in Georgia, during January and April, 1936, which I think answers the question as to the date you were uncertain about.

Preliminary Cross Examination by Mr. Leisure.

The witness said that he presumed that J. V. Yost to whom a letter written on the letterhead of John G. Butler Company, Savannah, Georgia, dated January 6, 1936, was

addressed, was the representative of the State Procurement "Officer" at Atlanta at that time. Mr. Harmon is the present State Procurement Officer for Georgia.

1850 The Mr. W. E. Hayghe appearing on Com. Ex. 330 B is the witness himself who received this letter. That is a certified true copy, certified by the State Procurement Office, of the letter he received. Mr. H. W. Collins, the addressee of Com. Ex. 330 F, is the Assistant Director of Procurement, Department of Supply. The witness does not know whether Mr. Harmon signed it or not but Mr. Harmon is the State Procurement Officer. The telegram marked Com. Ex. 330 G is from Commander C. R. Eagle, assistant to the Assistant Director of Procurement. The witness believes it is addressed to Mr. Harmon.

1851 Com. Ex. 330 H is another letter to the witness on this subject from Mr. Harmon. Com. Ex. 330 J is from Mr. Fender who is the traffic clerk in the office of the State Procurement Office at Atlanta at that time, to Mr. Yost who, the witness presumes, is one of the officials of the office. He is not acquainted with them personally.

Mr. Leisure: If Mr. Wooden cares to mark them for identification, we may have no objection to them, but no proper basis is made for their offe irn evidence at this time. If we can look them over, I may not object to them if they appear to be material.

1852 Mr. Wooden: Of course they are at liberty to look them over, to make their objections known, if any, and the grounds of their objections. I have already stated the grounds on which they are offered, as certified copies of communications passing in the ordinary course of business between the parties I have designated, and occurring back in January and April, 1936, before this case was ever called up.

Examiner Norwood: Are you making the point of their not being the originals?

Mr. Leisure: My point is this, Your Honor, if the letters are material it may be we want to cross examine one of the parties to the transaction, and we are deprived of that opportunity if one witness can just come here and bring all the files of his department. That is why I said that no proper basis has been laid. We may not have any objection to them if he wants to mark them for identification and let us look at them, but unless that is done I will

have to rely on my legal objection, that they have not been properly proven.

Examiner Norwood: He wants to proceed with his examination on those papers.

Mr. Zimmerman: I would like a reasonable time in which to examine the documents, in any event.

Mr. Hershberger: I think that should be done
1853 also. I happened to be looking at one of these, which I want to read a little from off the record, I do not want it to go on the record. I just want to read a few lines here to show that the letter is clearly hearsay.

Mr. Wooden: Your Honor, I am not technically disputing that proposition. I am offering these under the well recognized exception to the hearsay rule in force by recent Federal statute.

Mr. Hershberger: I do not agree with you, Mr. Wooden, that that statute goes so far as to permit you to introduce hearsay or self-serving declarations or statements in letters between parties who are not here, whom we have no opportunity therefore to cross examine, to find out the basis for their statements in the letter.

Mr. Wooden: That is a matter of interpretation of the statute. I think the statute is rather plain in its terms. I think it was its purpose to get away from such an objection on such matters.

Examiner Norwood: Off the record.

(Discussion off the record.)

Examiner Norwood: I shall do this. In view of the respondent's objection I shall reserve the ruling as to the receiving of Commission's Exhibit 330-A to J for identification until tomorrow, until I shall have time to examine the papers.

1854 Mr. Leisure: If they are properly identified and we do not need to cross examine on them, they may be received. These are not just technical objections. We will withdraw any objection we have if we find we do not need to cross examine on them.

1855 The witness identified Com. Ex. 330 B as a letter from the State Procurement Officer of the State of Georgia, dated January 15, 1936, addressed to him; "and B, C, D and E" as all parts of the same communication; "H and I" as a letter of January 31, 1936 from the state Procurement officer for the State of Georgia, addressed to the witness.

Mr. Wooden: Now, Your Honor, I renew the offer at this time of these particular exhibits, having shown by this witness that these letters were received by him individually from the State Procurement Officer.

1860 Q. Mr. Hayghe, referring again to these exhibits 330-A to J, inclusive, will you state for the record just how those papers came into being originally?

A. It developed from the effort on the part of the traffic clerk in the Atlanta office to effect savings in transportation. According to conversations had with him by myself, he pointed out numerous instances where the Atlanta office was being forced to pay commercial freight charges. Whereas, under an agreement reached by him with various dealers in the State, he could effect these savings due to land grants in the manner described in these

1861 letters. After he received tentative approval to do that there developed another situation not related to the cement purchases and in another section of the country, where similar efforts had been made which had resulted in considerable embarrassment. The carriers had called attention to the Land Grant Acts under which the land grant was only available on property in the United States, and in connection with their bills covering shipments made on Government bill of lading, and under such circumstances they refused to accord the benefit of the land grant.

An investigation developed that they were essentially correct, the railroads were essentially correct in that stand, and after several conferences we decided to stop this practice. It developed, however, from a mistaken effort to effect savings really to which we were not entitled and which we stopped.

Q. And this correspondence that comprises Exhibit 330-A to J, inclusive, does that cover that situation that you have just described?

A. Yes, sir, it does.

1862 Q. Was the State Procurement Officer of Georgia acting in connection within that within the scope of his duties as State Procurement Officer, in writing headquarters about it and discussing the matter with them?

A. He was.

Examiner Norwood: Was that, in the main, an official report of matters of fact?

The Witness: Yes, sir.

Mr. Wooden: Well, your Honor, I will again give you the opportunity of ruling them out or deferring judgment on them, after the showing I have just made.

Examiner Norwood: Well, unless the objection is insisted on, I certainly cannot take the responsibility of ruling other than I have. I will rule on that tomorrow morning.

1864 Q. Now, as I understand it, Mr. Hayghe, it was only in Florida and one or two other States where the manufacturers did bid direct on WPA purchases?

A. Yes, sir, that is correct.

Q. Do you know whether that situation in Florida still obtains?

A. It does not. Recently we received a communication from the State Employment Officer from Florida enclosing circulars by cement manufacturers, too, I believe, to their dealers in the State of Florida—

Mr. Leisure (interrupting): Now, if the Court please, I think we should have that proven in a proper way. We may not have any objection to it, but we ought to have it offered in the proper way rather than the witness's memory of what the document shows.

1865 By Mr. Wooden:

Q. You do not have to go into the contents or the substance of the document at all. I think we may stop just where you are.

Examiner Norwood: Read the question and the answer.

(The question and answer were read by the reporter.)

Examiner Norwood: I think he may state that. Objection overruled.

The Witness: Shall I complete the answer?

By Mr. Wooden:

Q. Yes.

A. —notifying them that after a given date specified in the circulars all bidding on relief projects, with certain exceptions also stated in the circular, would be confined to the local dealers.

Mr. Leisure: I move to have the answer stricken from the record on the further ground that different companies have been mentioned in the answer. It is not shown that they are respondents in this action. An unidentified circular or paper has been described by the witness orally. I move to have the answer stricken from the record.

Examiner Norwood: As I understand it, he has given information obtained by him in due course of
1866 business, in the course of his official duties, and this information was also evidenced by certain circulars and papers. That is the way I understand it.

Mr. Leisure: Does the Examiner know that was a circular issued by one of the respondents?

Examiner Norwood: He testified first as to certain facts and then went on to say that these circulars were of such import. Motion denied.

By Mr. Wooden:

Q. What is the paper I hand you now, marked for identification as Commission's Exhibit 331-A and B (handing document to the witness)?

1867 A. This is an original circular issued by the Florida Portland Cement Company, dated December 20, 1937, entitled "Announcement to the Trade," in which the Florida Portland Cement Company announces a sales policy effective at once.

Q. Was this circular one of those which you referred to a moment ago as having been received from your State Procurement Officer?

A. It is the original circular.

Mr. Wooden: I offer it in evidence.

Preliminary Cross-Examination by Mr. Leisure.

Q. Mr. Hayghe, was it on the basis of this circular 331-A that you gave your answer to the general question that that was your understanding today as to the situation in Florida?

A. It is, yes, sir.

Q. And did you receive circulars from any other companies?

A. We received one additional circular.

Q. I note this is from the Florida Portland Cement Company?

A. Yes, sir.

Q. Do you know what the other company was?

A. I would have to speak from recollection; the Lehigh Portland, I believe.

Q. And your answer then was based on the circulars you received from those two companies?

A. Yes, sir.

1868 Mr. Leisure: We have no objection to the exhibit.

(COM. EX. 331 was offered and received in evidence.)

By Mr. Wooden:

Q. Do you know whether the Lehigh Company has a mill in Florida?

A. I don't know.

Q. Do you know whether the Florida Portland Cement Company has a mill in Florida?

A. I could not testify as to that either.

Q. What is the paper I now show you marked Exhibit 332 for identification?

1869 A. This is a letter from the Monolith Portland Cement addressed to the State Procurement Office of California, in San Francisco, stating their reason for failing to bid in response to a particular invitation dated December 31, 1937.

Q. Is this one of the papers upon which you based your general statement a few moments ago as to a change in the situation in certain States?

A. No, sir.

Q. What was the situation in California with regard to your getting direct bids from mills on WPA purchases?

A. From the record, the situation there was that they received no bids from manufacturers, to the best of my recollection.

Mr. Wooden: I offer this paper 332 in evidence.

Mr. Leisure: No objection.

(COM. EX. 332 was offered and received in evidence.)

Q. Did you have any communication with your Florida State Procurement Officer either by letter or telephone or otherwise regarding a change in the ability to get bids direct in Florida?

A. Yes, sir, the State Procurement Officer called me on the long distance several weeks ago and stated

1870 that he had, the day previous to this conversation, received information that the manufacturers would not longer bid direct, and that he would endeavor to secure samples of the circulars issued to the dealers and submit them to me, which he did.

Q. Do you have the Lehigh circular?

A. I have not. I believe that is a copy of it; I don't think we have an original of the Lehigh circular.

Mr. Wooden: Might we call for a circular issued on that date, in the latter part of December, 1937, of the Lehigh Company for the Florida trade?

Mr. Leisure: Can you give us the copy so that we can locate it for you?

Mr. Wooden: It may be that we can locate one, but I do not seem to be able to do that right now.

By Mr. Wooden:

Q. Have you bought any cement in Florida since the circular issued by the Florida Cement Company?

A. I could not say.

Q. What is the difference, if any, in the price between what you pay when you buy direct from the mills and what you pay when you buy through the dealers?

A. The difference is the measure of deduction on account of land grant from commercial rate which varies in various locations.

Q. Do you know whether or not the prices made
1871 by dealers, how they compare with the prices made by the mills when they sell direct?

A. I can only reply based on information received by me in correspondence, that the difference amounted to from 1 to 20 cents a barrel, to the best of my recollection, representing dealer's commission.

Q. Have you ever compiled or had compiled for your information any specific concrete instances showing the amount resulting from the inability of the Government to take the benefit of land grant rates?

A. Yes, we have.

The witness identified Com. Exs. 333, 334 A to II, 335 A to NN, 336 A to Y, 337 A to CCC, 338 A to GGGG, and 339 A to UUU as abstracts of bids received by the State Procurement Officers in Florida and Alabama in response to invitations for bids for purchases of cement. The invitations, he believes are here. "(examining papers) Yes, sir." The pages that are marked in each instance
1872 as the "A" letter of the respective bids are a computation of the cost based upon the f.o.b. destination price, had "we" been able to deduct the commercial freight rate and paid the net land grant freight rate, and the cost to the Government under the Government's
1873 cost at destination; Com. Ex. 333 as the total delivered cost per barrel under invitations 5667-U, 6194, and 5949, based upon what was called Item 1 and Item 2

in the bids. The witness says that "333" is a summary of "334, 335 and 336".

Mr. Wooden: I will offer those papers for the record with the understanding that the basic material after any checking that is desired, is done, may be returned and the computations then remain the entire exhibit.

Examination by Mr. Leisure:

The witness said that this computation was made under his direction. "Exhibit 333" is a summary of the three others, "334, 335 and 336" as evidenced by the invitations. It is the summary of the first three there. "(indicating)"

1874 (COM. EXS. 333, 334-A to II, 335-A to NN, 336-A to Y, 337-A to CCC, 338-A to GGGG and 339-A to UUU, respectively, were offered and received in evidence.)

1875 By Mr. Wooden:

Q. Now, Mr. Hayghe, will you take those papers and tell us in each instance who were the bidders, what they bid and on what basis, and then show what the cost would have been to the government if it had deducted the commercial rate instead of using the government destination cost basis?

A. Must I confine that to the successful bidder?

Q. No, I want all the bidders, and then if your statement as to the difference in your calculation applies to only one bidder, or two, why, state that, of course.

A. In connection with invitation 6194 we have an invitation to bid on 132 barrels of cement for use at the county hospital at Brooksville, Florida. In response to the invitation bids were received from the Lone Star Cement Corporation, the Georgia Cement and Products Company, the National Cement Company, the Universal Atlas Cement Company, the Pennsylvania Dixie Cement Corporation, the Alpha Portland Cement Company, the Florida Portland Cement Company, and the Lehigh Portland Cement Company. With reference to the bid of the Florida Portland Cement Company—

Q. (Interposing): Do you have the bid prices from the different bidders?

A. Yes.

Q. Give the prices bid first.

Mr. Leisure: Are these emergency relief bid or

1876 W. P. A. bids?

Mr Wooden: They are, as I understand.

The Witness: They are.

Mr. Hershberger: Would you mind having him identify the dates, whether it was this year, last year, or three years ago?

The Witness: The invitation is dated January 30, 1937. The bids were various dates. Would you like those? Do you want the prices bid in each case?

By Mr. Wooden:

Q. Yes, give us that first.

A. The Florida Portland Cement Company bid alternate bid No. 1 unit price $2.46.

Q. Will you state what the alternate bid No. 1 was?

A. That was the f. o. b. destination, f. o. b. cars Brooksville, Florida, $2.46 per barrel. The alternate bid No. 2 was the total government cost at destination of $2.38591 per barrel.

Q. What did alternate bid No. 2 provide for?

A. Alternate bid No. 2 provided that the government would determine its cost at mill by deducting from the bid price the land grant rate, the commercial rate or special rate, whichever would be the lower.

Q. Was that from the so-called control clause?

A. The control clause.

1877 Q. What did the Government ask for? Did it ask for a Government destination cost?

A. We asked for bids f. o. b. cars point of origin and f. o. b. cars Brookville, Florida.

Q. And you got $2.46 f. o. b. Brookville?

A. Yes.

Q. Did you get f. o. b. mill at all?

A. No.

Q. You got a Government destination cost?

A. We got a Government destination cost.

Q. Will you state what that was?

A. $2.38591.

Q. Give us the alternate one and two for the other bidders.

A. The Alpha Portland Cement Company bid $2.46 alternate bid No. 1, $2.35418 alternate bid No. 2.

The Lehigh Portland Cement Company bid $2.46 alternate bid No. 1 and $2.35418 alternate bid No. 2.

The Lone Star Cement Corporation bid $2.46 alternate bid No. 1 and $2.35418 alternate bid No. 2. The Georgia

Cement & Products Company bid $2.46 alternate bid No. 1 and $2.35418 alternate bid No. 2.

Q. Do you know whether that bidder was a mill or a dealer?

A. I beg pardon?

Q. Do you know whether that bidder was a mill or dealer?

A. I do not know.

1878 Q. All right.

A. The National Cement Company bid $2.46 alternate bid No. 1 and $2.35418 alternate bid No. 2.

The Universal Atlas Cement Company bid $2.46 alternate bid No. 1 and $2.35418 alternate bid No. 2.

The Pennsylvania Dixie Cement Corporation bid $2.46 alternate bid No. 1 and $2.35418 alternate bid No. 2.

That is the end of the bidders.

Q. Now go ahead with your statement as to what the difference between the bids of any one or more of those bidders would have resulted in, the cost to the Government figured on the basis of a deduction of the commercial rate as distinguished from a deduction of the land grant rate, adding back on the land grant rate.

A. With respect to the bid of the Florida Portland Cement Company, whose shipping point is Tampa, Florida—

1879 Q. (Interposing) Incidentally, did that company get the award?

A. They did.

Q. Is that why you chose it to make the calculation that you are now going into?

A. That was the deciding factor in the selection of that particular one.

Q. Go ahead.

A. Shipping point Tampa, Florida. The f. o. b. destination price was $2.46 per barrel. We find that from Tampa, Florida, to Brooksville, Florida, we have a commercial rate of 11 cents per hundred pounds and a net land grant rate of 10.738 cents per hundred pounds, which reduced to an amount per barrel results in a freight charge per barrel, based upon the commercial rate of 41.8 cents, and a transportation cost per barrel based upon the land grant freight rate of 40.8044 cents per barrel. Had we been permitted to deduct the commercial transportation charge per barrel from the f. o. b. destination price we

would have computed a value at the mill of $2.042; it being assumed that the mill price plus the commercial freight charge was the measure of the f. o. b. destination price. Adding the land grant transportation cost per barrel to that value at mill so determined we find a total cost to the government of $2.45.0044 cents per barrel, whereas the total cost to the government at destination, under al-
1880 ternative bid No. 2, was $2.38591 per barrel.

In connection with Alpha Portland Cement Company's bid—

Q. (Interposing) Just let me interrupt. Is that a case where the control clause operated to deprive the government of the benefit of the land grant rate, or any better than the land grant rate?

A. In this particular case the bid under the control clause produced a lower cost.

Q. All right. That is what I thought it was.

A. With respect to the bid of the Alpha Portland Cement Company, using the same method of computation, their shipping point is Phoenixville, Alabama, their f. o. b. destination price was $2.46 per barrel. The commercial transportation charge per barrel from Phoenixville, Alabama, to Brooksville, Florida, was 95 cents. A deduction of the commercial transportation charge per barrel from the destination price would leave a value of $1.51 per barrel at the mill. The addition of the land grant freight rate, the land grant transportation charge from Phoenixville, Alabama, would produce a cost to the government of $2.0416158 per barrel, as compared with the price paid of $2.38591 to the Florida Portland Cement Company. That is to say, had we been able to deduct the commercial freight charge from the f. o. b. destination price of the Alpha Portland Cement Company, shipping from Phoenix-
1881 ville, we could have bought for approximately 34 cents per barrel less than we actually paid.

Q. Through another company?

A. Through another company.

Q. How did it happen that the award was made to the Florida Portland Cement Company?

A. For the reason that they were all tie bids and the award was made by drawing.

Q. If the drawing had resulted in the other companies —what was the name of the other company?

A. Alpha Portland Cement Company.

Q. If the drawing had resulted in the Alpha Portland Cement Company getting the award, then the deprivation that you have figured out there would have actually taken place?

A. No, because they had the control clause, too. We could not have deducted the commercial freight charge and charged the land grant.

Q. I mean if you had been able to do that?

A. Oh, yes.

Q. What is the difference between the Alpha destination cost figured one way, on alternate one, and the destination cost figured on alternate two? How much a barrel?

A. Alternate 1 is $2.46 per barrel. Alternate 2 is $2.35418 per barrel.

Q. Eleven cents difference?

1882 A. Approximately.

Q. Now, will you take the other case that you have there in the same way?

A. We find under invitation 5667-U issued by the State Procurement Officer for Florida, the request for bids f. o. b. point of origin and f. o. b. destination on 300 barrels of cement for use in connection with work at the high school at Groveland, Florida. In response to this invitation—

1883 Mr. Leisure: What is the date of that?

The Witness: Dated November 14, 1936. In response to this invitation, bids were received from Universal Atlas Cement Company, the Georgia Cement and Products Company, the National Cement Company, Lehigh Portland Cement Company, Atlas Portland Cement Company, Pennsylvania Dixie Cement Company, Florida Portland Cement Company, Lone Star Cement Corporation.

The Florida Portland Cement Company bid under alternate 1, $2.52 per barrel, alternate 2, $2.51½ per barrel.

The Lone Star Cement Company bid under alternate 1, $2.52 per barrel, and $2.51½ under alternate 2.

Pennsylvania Dixie Cement Corporation bid $2.52 per barrel under alternate 1 and $2.51½ per barrel under alternate 2.

The Alpha Portland Cement Company bid $2.52 per barrel under alternate 1 and $2.51½ under alternate 2.

The Lehigh Portland Cement Company bid $2.52 per barrel under alternate 1 and $2.51½ per barrel under alternate 2.

The National Cement Company bid $2.52 under alternate 1 and $2.51½ under alternate 2.

The Universal Atlas Cement Company bid $2.52 per barrel under alternate 1 and $2.51½ per barrel under
1884 alternate 2.

That completes that abstract. The successful bidder in this case was also the Florida Portland Cement Company.

By Mr. Wooden:

Q. How was the award made?

A. By drawing.

Q. All right.

A. Based upon their alternate 1 price of $2.52 per barrel, deducting the commercial freight cost of .50825 per barrel, we developed a value at the mill of $2.01175 per barrel. In this case, adding the commercial freight—there is no land grant involved—adding the commercial freight rate to that simply produces again the $2.52.

Now, in the case of the Lone Star Cement Corporation shipping from Boyles, Alabama, deducting the commercial transportation charge per barrel from the f. o. b. destination price, we develop a value at the mill of $1.475 per barrel.

Q. As against $2.05 in the case of the other company?

A. No.

Q. What was the mill value of the other company?

A. $2.01.

Q. Against $1.475?

A. Yes. Adding to that value at mill, the land grant freight rate from Boyles, Alabama, to the destina-
1885 tion of .632206 per barrel, which would have purchased for $2.1072076 per barrel as compared to the actual price paid in Florida Portland Cement Company of $2.515 per barrel.

Q. A difference of how much per barrel?

A. Approximately 40 cents.

Q. Would it have made any difference to the total paid whichever way the bidding fell in that case?

A. No, they were all identical bids.

Q. The Lone Star Company in that case would have gotten the same in any event, wouldn't it, whether you figured alternate 1 or alternate 2? I may be wrong about that.

A. Alternate 1, the f. o. b. destination price was $2.52 per barrel, and alternate 2 was $2.515 per barrel.

Q. In other words, it made it within a half a cent?

A. Yes.

Q. Approximately the same, figured either way?

A. Yes. The Lone Star Cement Company in their alternate 2, however, would have actually received for this cement if the bid had been let to them, for instance $1.882794 per barrel, whereas their f. o. b. destination price less the commercial transportation charge produced $1.475.

Q. In other words, they got the difference between the $1.47 that they were willing to take at the mill on a destination basis and what they actually got, and $1.88?

A. Yes.

1886 Q. That is where the 40 cents a barrel difference comes in?

A. Yes.

Q. Do you attribute that result to the use of the control clause by which you are not able to get a straight mill quotation, but have to deduct whichever rate is lower from the Government destination cost?

A. I have no opinion on that.

Q. To what do you attribute that difference of 40 cents a barrel?

A. I don't know just how to answer that. May I answer that by qualifying it a bit?

Examiner Norwood: Answer it any way you want.

The Witness: We assume—we do not assume, we know—that had the bid been let f. o. b. cars at destination, the Lone Star Cement Corporation would have been compelled to pay the commercial freight rate. Therefore it is upon that knowledge that we reached that value at mill of $1.475. That is all they could have secured out of a bid price of $2.52 f. o. b. cars at destination. However, we know that they actually would have received under the alternate No. 2, deducting the land grant freight rate, which in this case was the lowest, from their alternate No. 2 bid, would have produced a return to the mill of $1.882794.

By Mr. Wooden:

1887 Q. In other words, they were willing to take it less on the one basis $1.475, and on the other basis they wanted $1.88, is that right?

A. That is the way it worked out. As to the reason I can not say.

Q. Do you know, Mr. Hayghe, how the destination price quoted in such cases as that compared with the commercial destination price at the same point?

A. You mean the price to the public generally?

Q. Yes, commercial buyers.

A. No, sir, I do not. I have no knowledge of that.